

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12020-mg

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**6 | In the Matter of:**

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8 | RESIDENTIAL CAPITAL, LLC, et al.,

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## Debtors.

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HON. MARTIN GLENN

**U.S. BANKRUPTCY JUDGE**

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2 Trial Regarding Claim No. 386 Filed by Barry Mack

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here  
3 in Residential Capital, number 12-12020. Mr. Lewis?

4 MR. LEWIS: Yes, Your Honor.

5 THE COURT: Well, let me ask first before we begin:  
6 does anybody have anything they want to raise?

7 MR. LEWIS: I have nothing, Your Honor.

8 MR. GARBER: I have nothing at this time, Your Honor.

9 THE COURT: Okay. Call your first witness, Mr. Lewis.

10 MR. LEWIS: Your Honor, I'd like to call David  
11 Cunningham, please?

12 THE COURT: Certainly.

13 Mr. Cunningham, if you would come on around, and if  
14 you would raise right hand and be sworn. Right there, yeah.

15 (Witness sworn)

16 THE COURT: All right, please have a seat. You should  
17 have water and a cup there if you need it.

18 THE WITNESS: Thank you.

19 THE COURT: Okay, go ahead.

20 MR. LEWIS: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. LEWIS:

23 Q. Good morning, Mr. Cunningham.

24 A. Good morning.

25 Q. Would you state your full name, please?

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1 A. David Cunningham.

2 Q. And where do you reside?

3 A. In Doylestown, Pennsylvania.

4 Q. And what education do you have?

5 A. Some college, one year.

6 Q. And was there an emphasis in that one year?

7 A. Business management.

8 Q. All right. Do you have any other formal training of any  
9 kind?

10 A. Since I've been employed with GMAC Mortgage, we've had  
11 various training around leadership development, training on the  
12 systems, and you know, training from outside counsel, who used  
13 to come into the foreclosure department.

14 Q. What's your current employment?

15 A. I'm director of regulatory and compliance for ResCap  
16 Liquidating Trust.

17 Q. What does that position entail?

18 A. I fulfill our remaining obligations under the settlements  
19 entered into with the Department of Justice and the Federal  
20 Reserve Board.

21 Q. Okay. And how long have you held that position?

22 A. Since February of 2013.

23 Q. All right. And what was your previous employment?

24 A. I was the director of the foreclosure operation for GMAC  
25 Mortgage.

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1 Q. And what did that entail?

2 A. I was responsible for staffing, processes, and procedures  
3 associated with foreclosures for GMAC Mortgage.

4 Q. How long did you hold that position?

5 A. From June of 2007 to February of 2013.

6 Q. Okay. And prior to that, what was your employment?

7 A. I was manager of foreclosure operations for GMAC Mortgage.

8 Q. How is the job as manager different from director?

9 A. When I was manager, I was responsible for certain  
10 investors, our subservice clients in the foreclosure operation.

11 Q. So particular portfolios, for example?

12 A. Yes.

13 Q. Okay. How long did you hold that position?

14 A. Since 2003.

15 Q. How long have you been employed by GMAC in one capacity or  
16 another?

17 A. Fourteen years.

18 Q. In the course of your employment, have you become familiar  
19 with what are generally known as servicing notes?

20 A. Yes, I have.

21 Q. Why don't you tell us, on a general level, what servicing  
22 notes are?

23 A. Servicing notes were -- reside in a system called LoanServ  
24 that we used as our system of record to track servicing  
25 activities for mortgage loans.

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1 Q. Is that a program that you bought from some vendor?

2 A. Yes.

3 Q. And did you modify the program at all?

4 A. Yes, we did.

5 Q. Did you have a role in doing that?

6 A. I did.

7 Q. What was that role?

8 A. We would enhance the system with various different what's  
9 referred to as CITs, customer inquiry tracking codes and  
10 different codes in the system to communicate --

11 Q. What gets entered into --

12 A. -- in our department.

13 Q. -- LoanServ?

14 A. Comments from communications with customers. There's  
15 payment history, tracking of payments from customers and going  
16 out for taxes and insurance and other related activities, and  
17 comments associated with the loan.

18 Q. Do you know generally how to read LoanServ notes?

19 A. Yes, I do.

20 Q. It has various abbreviations that it uses, does it not?

21 A. Yes.

22 Q. Do you know some of them?

23 A. I do.

24 Q. Do you know them all?

25 A. No, I don't.

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1 Q. Okay. Is there an index for the abbreviations?

2 A. Yes, there is.

3 Q. Okay. So if you don't know an abbreviation, you go look  
4 up the index, if you need to have that information?

5 A. That's correct.

6 Q. Okay. Did you use LoanServ yourself, apart from having a  
7 role in developing it?

8 A. Yes, I did.

9 Q. So you would enter information in it?

10 A. Yes, I would view the application and enter comments and  
11 information into the application.

12 Q. And would you obtain information from it?

13 A. Yes.

14 Q. Okay. And that was as both manager and director of the  
15 mortgage foreclosure department?

16 A. Yes.

17 Q. Okay. Now, on the counter up there somewhere, I think,  
18 there's a big white binder that looks like this. I'm going to  
19 ask you to open it to Exhibit G. Are you there?

20 A. Yes.

21 Q. Can you just thumb through it very quickly. I'm going to  
22 ask you if you recognize what it is?

23 A. Okay.

24 Q. Can you tell me what that is?

25 A. These are LoanServ history notes, or servicing notes.

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1 Q. And can you tell who the borrower is?

2 A. Yes, Barry Fritz Mack.

3 Q. Okay. And does this cover the entire time that the Macks  
4 were a borrower?

5 A. Yes, it does.

6 Q. How can you tell?

7 A. On the first page you see a reference to a welcome letter,  
8 eligible, which is the beginning of the loan. And at the end  
9 of the history you see liquidation activities, such as a  
10 payoff.

11 Q. Okay. And after that, there would be no further notes,  
12 absent some further development?

13 A. Correct.

14 Q. Okay. Now, I've asked you to review these notes  
15 generally, have I not?

16 A. Yes.

17 Q. Okay. And you've done that?

18 A. Yes, I have.

19 Q. Okay. You haven't memorized them, I take it?

20 A. No, I haven't.

21 Q. Okay.

22 THE COURT: I see these notes appear to be redacted.  
23 Could you explain that or have the witness explain it. Are  
24 they -- first of all, are they redacted? I see large numbers  
25 of entries with no transaction message. I assume from prior

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1 matters where I've seen loan servicing notes that means they've  
2 been redacted. Maybe I'm wrong.

3 Q. Do you know?

4 A. I don't.

5 MR. LEWIS: These were used in the deposition of Mr.  
6 McGuire (ph.) that Mr. Garber took in the Florida litigation.  
7 That's the tab --

8 THE COURT: Well, just look at page 1, Exhibit G page  
9 1 --

10 MR. LEWIS: Yeah, no. I --

11 THE COURT: -- I mean there's large -- going through  
12 it, leafing through it, there are large blanks, which appear to  
13 me --

14 MR. LEWIS: I understand --

15 THE COURT: -- to be redactions.

16 MR. LEWIS: My point, Your Honor, was that Mr.  
17 Garber's more likely to know the answer to that question,  
18 because he used them --

19 THE COURT: Well, they're your client's notes.

20 MR. LEWIS: I understand. I can get you the answer,  
21 but I don't know the answer, and Mr. Cunningham doesn't know  
22 the answer.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: We did not redact them as part  
25 of this.

1 THE COURT: Okay.

2 MR. LEWIS: We just took them as they came from the  
3 deposition of Mr. McGuire.

4 BY MR. LEWIS:

5 Q. Now, do the servicing notes usually include some reference  
6 to any contact with the borrower, whether it's oral or written,  
7 in person, telephone?

8 A. Yes.

9 Q. Okay. And that was your practice, was it not?

10 A. Yes, it was.

11 Q. It was to enter some reference to any contact?

12 A. Yes.

13 Q. And so if you got a letter, you got a phone call from the  
14 borrower, something normally would be entered --

15 A. Yes.

16 Q. -- that reflected that that had happened, and maybe  
17 something about what it was?

18 A. That's correct.

19 Q. Can you say that a hundred percent of the time that  
20 happened?

21 A. No, I can't.

22 Q. Okay. But it was your goal that it did happen?

23 A. Yes.

24 Q. In fact, you trained your people to do that, did you not?

25 A. That's correct.

1 Q. Now, was there another computer program that you used  
2 called LPS?

3 A. Yes, there was.

4 Q. What is LPS?

5 A. LPS was the system that was used to communicate with  
6 outside counsel on foreclosures and bankruptcy.

7 Q. And was that also a vendor-supplied system?

8 A. Yes, it was.

9 Q. And it was modified after you obtained it. Is that right?

10 A. Yes.

11 Q. Did you have any role in modifying that system?

12 A. Yes, I did.

13 Q. Okay. Did you have any occasion to use that system?

14 A. Yes, I did.

15 Q. And that's because you would be communicating with  
16 foreclosure counsel?

17 A. Correct.

18 Q. Do LPS entries typically get reflected in LoanServ?

19 A. Yes, they do.

20 Q. And so if you had a communication with foreclosure  
21 counsel, for example, through LPS, that would also be entered  
22 into LoanServ in some fashion?

23 A. Yes, it would.

24 Q. Okay. And vice versa, if they communicated with you and  
25 that was entered into LPS, that would also get entered into

1 LoanServ in some fashion?

2 A. Yes, it would.

3 Q. Okay. Can you say that happened a hundred percent of the  
4 time?

5 A. No, I can't.

6 Q. Same testimony, essentially, right? You aim for that, but  
7 you can't verify personally that it happened a hundred percent  
8 of the time?

9 A. Correct.

10 Q. Okay. Now, if you started a foreclosure, would all of  
11 your communications with counsel who was handling the  
12 foreclosure be through LPS?

13 A. Yes, it would.

14 Q. So you'd make the referral through LPS, you'd supply the  
15 documents through LPS, you'd check up on the progress through  
16 LPS, they'd let you know what was going on through LPS, and so  
17 on?

18 A. Yes.

19 Q. You would not normally have direct contact with local  
20 counsel?

21 A. Not outside of the LPS system, no.

22 Q. Okay. Now, you know that this case is about a foreclosure  
23 that GMAC began against the Macks in 2009. Is that correct?

24 A. Yes.

25 Q. Okay. Can you look through the LoanServ notes and tell me

1 where you first see any reference to that?

2 A. On page 8, the entry on July 23rd of 2009, with a  
3 transaction type of FOR, where it references "approved for  
4 foreclosure, 7/23/09".

5 Q. I'd like to go over these columns on the left to begin  
6 with. So "transaction added date", is that the date of the  
7 entry?

8 A. Yes, it is.

9 Q. And the "transaction type", what does that refer to?

10 A. That's the type of entry being entered into the LoanServ  
11 application.

12 Q. Okay. And was there a special code for communications  
13 with counsel?

14 A. Yes, there was.

15 Q. And what was that code?

16 A. It would be under the transaction user ID 01122.

17 Q. And the transaction user ID, that's the third column?

18 A. That's correct.

19 Q. And it -- what would go under this column besides 01122?  
20 What other kinds of information would go under this column?

21 A. The transaction user ID would identify the person within  
22 servicing who is making the entry into the LoanServ  
23 application.

24 Q. Okay. So 01122 treats counsel as a person?

25 A. Yes, it does.

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1 Q. A separate person?

2 A. Yes.

3 Q. Okay. Now, you've identified the first indication of a  
4 foreclosure as being on 7/23 and with a transaction type FOR.  
5 If you look up a little bit higher, maybe four or five lines,  
6 do you see a transaction code LMT?

7 A. Yes.

8 Q. It's also on 7/23?

9 A. Yes.

10 Q. And what does that refer to?

11 A. Loss mitigation.

12 Q. And what's that?

13 A. Loss mitigation provides alternatives to homeowners.

14 Q. So this --

15 A. For --

16 Q. -- is when you -- a homeowner applies, asks for some kind  
17 of modification on his loan?

18 A. A modification or a liquidation, such as a short sale or a  
19 deed in lieu of foreclosure.

20 Q. So this -- does this entry indicate, then, that on 7/23,  
21 operator number 31938 opened a loss mitigation file for the  
22 Macks?

23 A. Yes.

24 Q. Okay. Now, does the same operator -- is it the same  
25 operator who enters the foreclosure file -- who opens the

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1 foreclosure file?

2 A. Yes, it is.

3 Q. Would that be normal?

4 A. No, it wouldn't be.

5 Q. Why is that?

6 A. The loss mitigation associate is not authorized or not  
7 allowed to update foreclosure codes.

8 Q. Okay. Can a loss mitigation associate stop a foreclosure?

9 A. Yes, they can.

10 Q. And why would that happen?

11 A. With loss mitigation, when they provide alternatives to  
12 homeowners and put a borrower into a plan, they go and close  
13 out the file with counsel, you know, to make sure there's no  
14 handoff issues between the different servicing units. So loss  
15 mitigation will reach out to counsel directly to close out  
16 those files when they enter into an agreement with a customer.

17 Q. Okay. So it looks like the opening of the foreclosure  
18 file here was a mistake by somebody not authorized to do that?

19 THE COURT: Ask a nonleading question.

20 MR. LEWIS: Okay.

21 Q. Do you draw any conclusions about the --

22 THE COURT: Let me ask you, do you have any personal  
23 knowledge about what happened in the Mack file? Do you have  
24 any personal knowledge about how the foreclosure was initiated  
25 or their efforts to obtain a loan modification?

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1 THE WITNESS: I know what's based on the servicing  
2 notes.

3 THE COURT: I can read them, too. You'll interpret  
4 them. But my question to you is, do you have any personal  
5 knowledge about what happened with respect to the Macks' loan  
6 and the initiation of foreclosure, or consideration of loan  
7 modification, other than what appears in the loan servicing  
8 notes?

9 THE WITNESS: No, I do not.

10 THE COURT: Ask your next question.

11 MR. LEWIS: Okay.

12 Q. Now, I'd like to look a little bit further down the same  
13 page.

14 THE COURT: Do you know who 31938 is?

15 THE WITNESS: I don't.

16 THE COURT: Did you make any effort to find out who it  
17 was?

18 THE WITNESS: I did not.

19 THE COURT: It's a person. It was -- it was a person?

20 THE WITNESS: It was a person.

21 THE COURT: Do you know who it was, Mr. Lewis?

22 MR. LEWIS: No, I don't, Your Honor. And most of  
23 those people are gone.

24 THE COURT: Well, they may be gone, but I --

25 Q. If you look further down the page, and you see another

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1 entry "FOR", do you see that, on 7/24?

2 A. Yes, I do.

3 Q. And what does that entry indicate?

4 A. The entry indicates that the file was closed in the  
5 LoanServ servicing system.

6 Q. Now, when a foreclosure is terminated in LoanServ, does  
7 someone also have to communicate with counsel --

8 A. Yes.

9 Q. -- to terminate the foreclosure through LPS?

10 A. Yes, they do.

11 Q. And that would normally show up in here, wouldn't it, if  
12 that happened on the same day?

13 A. Yes.

14 THE COURT: Could you ask nonleading questions?

15 MR. LEWIS: Okay.

16 THE COURT: I really want to know about this. I don't  
17 want you leading the witness through it. I want to know what  
18 happened here.

19 MR. LEWIS: Yes, Your Honor.

20 Q. So if you thumb through these notes, when is the next  
21 entry that you find --

22 THE COURT: Do you know who 31578 is?

23 THE WITNESS: I do not.

24 THE COURT: It's a different person than 31938?

25 THE WITNESS: Yes, it is.

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1 Q. Are you familiar with what's called an "exception report"?

2 A. Yes, I am.

3 Q. What's an exception report?

4 A. On a -- within the foreclosure operation on a daily basis,  
5 we would -- a report would be auto-generated within my area to  
6 identify loans that were coded as a foreclosure in the LoanServ  
7 application but were contractually current.

8 Q. Okay. And that happened on a daily basis?

9 A. Yes, it would.

10 Q. Now, if you'd look through these notes, can you tell me  
11 the next place you'd find any reference to the foreclosure  
12 process?

13 A. On 7/24, I show that the file was received on 7/24 of 2009  
14 by David J. Stern (ph.).

15 THE COURT: Where do you see that?

16 THE WITNESS: On page 8 under -- on 7/24 with  
17 transaction code 01122.

18 THE COURT: That's Mr. Stern, 01122?

19 THE WITNESS: That is the --

20 THE COURT: Or his firm?

21 THE WITNESS: -- LPS application -- it's notes from  
22 the LPS application going into LoanServ.

23 THE COURT: So how do you know it was Stern?

24 THE WITNESS: Because when it references "to Law  
25 Office of David J. Stern," down toward the bottom.

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1 THE COURT: Let me --

2 THE WITNESS: It's the ninth line up.

3 THE COURT: Right.

4 Q. And what does this entry indicate to you?

5 A. That the foreclosure referral was received by David J. Stern.

7 Q. What's the next entry regarding the foreclosure process  
8 that you find?

9 A. On page 9 the third line --

10 THE COURT: Could you come back to page 8 for a  
11 minute? The entry just immediately below "to Law Offices of  
12 David J. Stern," what's PA at 7/24/2009?

13 THE WITNESS: That's a continuation from the prior  
14 line. So it would be Law Offices of David J. Stern --

15 THE COURT: Okay.

16 THE WITNESS: -- PA.

17 THE COURT: All right. What's the entry two lines  
18 further, just the date 7/24/08 (sic)?

19 THE WITNESS: It would be a continuation of similar  
20 activities. It was received by the Law Offices of David J.  
21 Stern on 7/24.

22 THE COURT: So all those lines are the same -- are  
23 really the same entry?

24 THE WITNESS: They are.

25 THE COURT: I just want to make sure I understand.

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1 The 01122, that's a person at GMAC?

2 THE WITNESS: It was set up as a transaction user ID  
3 for information from the LPS application to be put into  
4 LoanServ.

5 THE COURT: Okay.

6 THE WITNESS: So it's not an actual person. It's to  
7 identify that that's where it came from.

8 THE COURT: All right. Go ahead.

9 BY MR. LEWIS:

10 Q. What's the next reference you find to the foreclosure?

11 A. On page 9 there's a -- on July 27th of 2009, there's  
12 "upload comment title search".

13 Q. I'd like you to turn over to page 14. Turn to page 14.

14 Are you there?

15 A. Yes, I am.

16 Q. Okay. And if you look down towards the bottom, there's a  
17 whole series of FOR entries. Do you see those?

18 A. Yes, I do.

19 Q. What do those entries tell you?

20 A. That on September 2nd of 2009, the attorney was notified  
21 to close and bill by Marina Sorona (ph.)

22 Q. Okay. And does it give you any other information?

23 A. It also says that the attorney confirmed that the file was  
24 closed on September 2nd of 2009.

25 Q. You have no personal knowledge of why there was this

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1 hiatus between the time that the loan -- the foreclosure was  
2 closed in LoanServ and this information went to and came back  
3 from Stern's office in September. Is that right?

4 A. That's correct.

5 THE COURT: May I ask you, Mr. Cunningham, at an  
6 evidentiary hearing last week -- it all kind of blends  
7 together -- or the week before, in a ResCap matter, the Trust's  
8 lawyers put in evidence, an exhibit from -- which I believe it  
9 was from the LPS system, but it also included payment history  
10 with it. Is the payment history part of the LPS system?

11 THE WITNESS: No, it's not.

12 THE COURT: Maybe I didn't mean LPS system. Not LPS.  
13 Is it part of the LoanServ history notes? That's what --

14 THE WITNESS: It's part of the LoanServ application,  
15 yes.

16 THE COURT: Do you have to print separate -- it was  
17 presented in evidence as a single document before me that  
18 included the payment history for the particular loan and all of  
19 the notes associated with that loan. Do you have to print  
20 those separately? It was presented as a single document to me.

21 And the reason I'm asking this is that I think the  
22 record here indicates and certainly it's Mr. Mack's testimony  
23 that he was always current in his payments. And so that's why  
24 I'm inquiring whether -- I've been given this exhibit with  
25 notes but not the payment history. Would they appear together?

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1 THE WITNESS: Not typically. It depends on how you  
2 pull the information. I don't know what was provided to you  
3 last week, but I know the payment history and the comment  
4 history are typically separated because of how the LoanServ  
5 application works.

6 MR. LEWIS: Your Honor, if it helps at all, one of the  
7 stipulated facts is that they were always current on the loan.

8 THE COURT: That they were --

9 MR. LEWIS: Always current on their loan.

10 THE COURT: Oh, I know that.

11 MR. LEWIS: There's no dispute about that.

12 THE COURT: But what I'm -- I mean somebody triggered  
13 a foreclosure here when they were current on their loan, and  
14 I'm just -- I've been given loan service notes, but last week I  
15 was given loan service notes that appeared in a single document  
16 with the payment history. And I would think that if somebody  
17 had looked at the payment history, they wouldn't go ahead and  
18 trigger a foreclosure if the borrower is current.

19 MR. LEWIS: Your --

20 THE COURT: The loan payment history for the loan last  
21 week showed when the borrower missed payments.

22 MR. LEWIS: Your Honor, I think I might be able to ask  
23 a question that will help to clarify that a bit.

24 THE COURT: Go ahead.

25 BY MR. LEWIS:

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1 Q. Mr. Cunningham, you've already testified that the same  
2 person who entered the -- opened the loan mitigation file is  
3 the person who also started the foreclosure. Do you recall  
4 that testimony?

5 A. Yes.

6 Q. On the computer screen, are those two fields on the same  
7 screen?

8 A. Yes, they were.

9 THE COURT: The foreclosure and the loss mitigation  
10 are in the same screen? Is that what you're saying?

11 THE WITNESS: Yes.

12 THE COURT: Okay. Go ahead.

13 MR. LEWIS: And our surmise -- it's not evidence, but  
14 our surmise is she wasn't authorized to do that but she --

15 THE COURT: She did it.

16 MR. LEWIS: -- accidentally did it -- entered  
17 something in the wrong field.

18 THE COURT: Okay.

19 MR. LEWIS: But we don't know that.

20 THE COURT: Okay. Did you ever find out who these  
21 people were?

22 MR. GARBER: No, Your Honor, I didn't.

23 THE COURT: Go ahead.

24 MR. LEWIS: Thank you, Your Honor.

25 Q. Mr. Cunningham, I asked you earlier whether I had asked

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1 you to go through all these notes, and you said that you had  
2 done so at my request. Do you recall that?

3 A. Yes, I did.

4 Q. Now, looking at this file, the rest of these LoanServ  
5 notes, do you find any further reference to the foreclosure  
6 procedures or the litigation between the Macks and Deutsche  
7 Bank?

8 A. Can you clarify the question?

9 Q. Yeah. Is there any further evidence -- is there any  
10 further reference in the LoanServ notes to litigation between  
11 the Macks and Deutsche Bank?

12 A. There is a comment on Feb -- I'm sorry, September 15th, of  
13 2009 from David Stern on page 15 that references that the file  
14 was sent to dismissals and file closed per client, 9/2/2009,  
15 reinstated.

16 THE COURT: Where do I find it?

17 THE WITNESS: On page 15 in the -- just about the  
18 middle of the page, under the transaction user 01122.

19 (Pause)

20 THE COURT: Is that the file closed, per client? Is  
21 that what you referenced?

22 THE WITNESS: That would have been an entry from David  
23 Stern acknowledging that he closed the file at our request.

24 THE COURT: What's "reinstated DIS"?

25 THE WITNESS: That would have been the closing reason

1 that he would have put when he closed the file out.

2 THE COURT: I see a similar entry on 9/15 and on 9/23.

3 THE WITNESS: It's a continuation of his comment from  
4 9/15.

5 THE COURT: How is it a continuation when it's a  
6 different date?

7 THE WITNESS: Well, the different date just references  
8 that he is returning the original note and mortgage back to  
9 GMAC. So the 9/23 comment is referencing that he sent the file  
10 to dismissals, but he's returning the original note and  
11 mortgage.

12 THE COURT: Okay.

13 Q. Now, in the balance of the LoanServ notes, do you find any  
14 further reference to the foreclosure action?

15 A. No, I don't.

16 Q. Okay. Now, I also asked you specifically, did I not, to  
17 look at the LoanServ notes from October 22nd, 2009 through  
18 November 6th, 2009. Do you recall that request?

19 A. Yes.

20 Q. And I asked you to look for any indication that the GMAC  
21 had received a letter from the Macks, whether it's described as  
22 a letter or some other form of communication. Do you recall  
23 that?

24 A. Yes.

25 Q. Did you find anything?

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1 A. No, I didn't.

2 Q. Okay.

3 MR. LEWIS: Your Honor, I have no further questions of  
4 the witness.

5 THE COURT: Let me ask -- Mr. Garber is probably going  
6 to cover this, but I just --

7 One of the issues here is over different addresses for  
8 general inquires and for RESPA inquires. If written inquiries  
9 had been received for general inquires, should they be entered  
10 into the loan servicing notes?

11 THE WITNESS: Yes.

12 THE COURT: And if a RESPA inquiry -- RESPA qualified  
13 written request was received, should that be entered as well?

14 THE WITNESS: I -- because I wasn't in that  
15 department, I'm not sure exactly what their procedures were,  
16 but generally, I would say yeah.

17 THE COURT: You --

18 THE WITNESS: I would say yes.

19 THE COURT: -- you don't know?

20 THE WITNESS: I don't know.

21 THE COURT: Okay, go ahead, Mr. Garber. You want to  
22 cross?

23 MR. LEWIS: Well, since you've asked that question, I  
24 have another one --

25 THE COURT: Yeah, go ahead.

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1 MR. LEWIS: -- I want to ask him.

2 THE COURT: Go ahead.

3 BY MR. LEWIS:

4 Q. Mr. Cunningham, was there a particular department or group  
5 that dealt with RESPA inquiries, QWRs?

6 A. Yes.

7 Q. What was the name of that group?

8 A. It was called Voice of the Customer in Customer Care.

9 Q. That was their job?

10 A. Yes.

11 Q. And where were they located?

12 A. In Waterloo, Iowa.

13 Q. From when?

14 A. I started in 2001, and Waterloo, Iowa was there when I  
15 started. So prior to me starting with GMAC Mortgage.

16 MR. LEWIS: Okay. I have no further questions now,  
17 Your Honor. Thank you.

18 THE COURT: But what about -- customer care was  
19 located in Waterloo, Iowa?

20 THE WITNESS: It was, yes.

21 THE COURT: Whether that's for general inquiries or  
22 RESPA requests? I mean, Mr. Lewis put in evidence yesterday a  
23 monthly statement, and it had several addresses. It had  
24 something for general inquiries, it had an address for RESPA  
25 inquiries. They were both in Waterloo, Iowa, they just were

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1 different post office boxes. So were -- and I think they were  
2 both addressed "Customer Care", but they had different PO  
3 boxes. So was all of the customer care, whether it was RESPA  
4 inquires or general inquires, in Waterloo, Iowa?

5 THE WITNESS: The department was.

6 THE COURT: Okay.

7 Q. But to be clear, the subgroup that dealt with QWRs, that  
8 was their job?

9 A. Correct.

10 Q. They didn't deal with other stuff?

11 A. No, they didn't?

12 Q. Okay.

13 THE COURT: Just a minute.

14 (Pause)

15 THE COURT: What's the code "NT"? What does that  
16 mean?

17 THE WITNESS: I don't know off the top of my head.

18 THE COURT: Look on page 23 of Exhibit G. There are a  
19 large number of entries with the code NT, can you tell from  
20 looking at the entries what NT is? Does that help you?

21 THE WITNESS: It doesn't help me with what the code  
22 means specifically, but I know what took place in this  
23 transaction on page 23 for NT.

24 THE COURT: What was the transaction?

25 THE WITNESS: It was a payoff that would have been

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1 faxed to Barry Fritz Mack. The payoff quote would have been  
2 good through February 25th of 2010.

3 THE COURT: All right, let me wait for Mr. Garber to  
4 do his cross-examination. I may have some more questions.

5 Go ahead, Mr. Garber.

6 MR. LEWIS: Thank you.

7 THE COURT: Thank you, Mr. Lewis.

8 MR. GARBER: Your Honor, I estimate my cross-  
9 examination will be an hour-and-a-half to two hours. Could I  
10 ask the Court's indulgence to take a short break before --

11 THE COURT: Absolutely. Let's take a -- is a ten-  
12 minute recess enough for you?

13 MR. GARBER: That would be fine.

14 THE COURT: Okay, we'll take a ten-minute recess.  
15 Okay. And when I come back in, everybody can stay in their  
16 seats, okay? You don't have to rise.

17 (Recess from 10:44 a.m. until 11:05 a.m.)

18 THE COURT: Everybody stay seated. Thanks, Mr.  
19 Cunningham.

20 All right, cross-examination?

21 MR. LEWIS: Your Honor, I've discussed with Mr. Garber  
22 that I'd like to ask one or two more questions of the witness.

23 THE COURT: Sure, go ahead.

24 MR. LEWIS: Thank you, Your Honor.

25 BY MR. LEWIS:

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1 Q. Mr. Cunningham, you understand you're still under oath?

2 A. Yes.

3 Q. Okay. You testified earlier about exception reports. Do  
4 you recall that testimony generally?

5 A. Yes, I do.

6 Q. What's the purpose of an exception report?

7 A. The exception report was to identify loans where they're  
8 in foreclosure and shouldn't be.

9 Q. Okay. So it was a safeguard?

10 A. It was, yes.

11 Q. A nightly safeguard?

12 A. It was autogenerated every day.

13 Q. Okay. Now, in the course of reading servicing notes in  
14 LoanServ, did you ever see entries indicating that a qualified  
15 written request had been received?

16 A. I have, in the past, yes.

17 Q. And have you seen entries that indicated that responses  
18 have been sent to those qualified written requests?

19 A. Yes.

20 MR. LEWIS: Okay, I have no further questions, Your  
21 Honor.

22 THE COURT: Okay, cross-examination.

23 (Pause)

24 CROSS-EXAMINATION

25 BY MR. GARBER:

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1 Q. Good morning, Mr. Cunningham.

2 A. Good morning.

3 Q. I haven't had the pleasure of meeting you before today,  
4 have I?

5 A. No.

6 Q. And I realize you made numerous answers on direct  
7 examination. To be honest with you, I wasn't sure I heard all  
8 of them, so I'll try not to repeat any of them, but forgive me  
9 if I do repeat one or two.

10 A. Okay.

11 Q. You now work for the ResCap Liquidating Trust?

12 A. Yes.

13 Q. And you have done so since February '13 to the present?

14 A. February of 2013.

15 Q. And before that you worked for GMAC Mortgage, correct?

16 A. Yes.

17 Q. From June '07 to February '13 when you began working for  
18 ResCap, you were the director of the default operations?

19 A. Director of foreclosure operations.

20 Q. Okay, is there a difference between that and default  
21 operations?

22 A. Foreclosure operation was a part of default operations.

23 Q. Okay. And you were not director of default operations?

24 A. I was director of the foreclosure operation.

25 Q. Okay. You managed over 65,000 foreclosures for various

1 investors?

2 A. Yes, I did.

3 Q. And you led a team of 4 managers, 8 supervisors, 125  
4 specialists?

5 A. Yes, I did.

6 Q. You provided ongoing oversight of performance?

7 A. Yes, I did.

8 Q. So would it be fair to say that the leadership and the  
9 oversight of the entire foreclosure department in Fort  
10 Washington, Pennsylvania for GMCAM was under your  
11 responsibility?

12 A. Yes, it was.

13 Q. And you set up the guidelines and saw that they were  
14 implemented, did you not?

15 A. Well, there were a number of different parts of servicing:  
16 audit, compliance, risk, in addition to just myself. But I was  
17 responsible for the foreclosure operation.

18 Q. And your office in Fort Washington, did they handle all  
19 the foreclosures for GMACM?

20 A. Yes, they did.

21 Q. So they would have handled them all over the country?

22 A. Yeah.

23 Q. Every -- all of the fifty states?

24 A. Yes.

25 Q. Including Florida?

1 A. Yes.

2 Q. And your office was responsible for hiring contractors,  
3 that is, attorneys, who would handle those foreclosures for  
4 you?

5 A. Yes, we were.

6 Q. And one of the attorneys that you chose was a gentleman  
7 named David Stern, was it not?

8 A. It was -- he was a law firm within part of our attorney  
9 network, yes.

10 Q. And he was an attorney that was vetted by your office?

11 A. He was an attorney that was in place with GMAC prior to me  
12 starting in 2001, for GMAC. But yes, he was one of our  
13 attorneys.

14 Q. Did you ever do any quality control checks on his work?

15 A. That was not within the foreclosure operation. There were  
16 other business units that were responsible for oversight of  
17 attorneys.

18 Q. Prior to the 1st of January 2010, did you have any reason  
19 to believe that he was performing at a substandard basis?

20 A. No, I didn't.

21 Q. You didn't have any complaints that came back?

22 A. Again, attorney performance was managed within a group  
23 that was called Vendor Management or Default Supplier  
24 Relations. So a lot of --

25 THE COURT: I'm sorry, I missed the last part of your

1 answer.

2 A. It was managed within a group that was called Vendor  
3 Management or Default Supplier Relations.

4 THE COURT: Okay. I just didn't hear the last --

5 THE WITNESS: Sorry.

6 Q. Forgive me. I've forgotten some of the numbers, but it is  
7 it true that in some months you sent many thousands of  
8 foreclosures to David Stern to handle across the State of  
9 Florida?

10 A. I don't know the number specifically.

11 Q. Would it be true that in total he handled over 60,000  
12 foreclosures for General Motors in the State of Florida?

13 A. I don't know.

14 Q. You work primarily out of the Fort Washington office,  
15 don't you?

16 A. Yes, I do.

17 Q. GM has a lot of different offices across the country?

18 A. I don't know about General Motors, but GMAC --

19 Q. GMACM?

20 A. -- GMAC -- is there a certain time frame in question or --

21 Q. Well, I'm primarily interested in 2008/2009?

22 A. So GMAC was primarily based out of Dallas, Texas;  
23 Waterloo, Iowa; and Fort Washington, Pennsylvania.

24 Q. And each location handled a different type of interest for  
25 GMACM, didn't it?

1 A. Different servicing operations, yes.

2 Q. Fort Washington was the one that handled the foreclosures?

3 A. Yes.

4 Q. Dallas, Texas handled collections?

5 A. There were a number of different servicing units down  
6 there.

7 Q. Did they handle collections?

8 A. Some collections, yes.

9 Q. And what's the difference between a collection and a  
10 foreclosure?

11 A. Collections was an operation that would collect payments  
12 from delinquent customers.

13 Q. Okay. So that was pre-foreclosure?

14 A. Yeah.

15 Q. So if there was a problem with a loan, it would go first  
16 to Dallas, who would try to collect on it, and then it would go  
17 into foreclosure, if they were unsuccessful?

18 A. Well, collections was based out of Dallas and out of  
19 Waterloo, Iowa. But yes. Yes, the collections would be before  
20 foreclosure.

21 Q. And Waterloo, Iowa was the site at which GMACM maintained  
22 its customer care, correct?

23 A. That was one of the operations in Waterloo.

24 Q. So if an individual were to call customer care, they would  
25 be getting Waterloo, Iowa?

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1 A. I don't know.

2 Q. Okay. I have a picture I would like to show you.

3 MR. GARBER: May I approach, Your Honor?

4 And I only have the one picture.

5 THE COURT: Is it marked for ID?

6 Q. Do you recognize this picture?

7 A. I don't know.

8 Q. I'm sorry?

9 THE COURT: You said you don't?

10 THE WITNESS: It's hard to see. I just see trees and  
11 a bench.

12 Q. So you don't recognize that particular site?

13 A. I mean, I -- I don't see a site. I see trees and a bench.

14 Q. Okay. Have you ever been out to the site at Waterloo,  
15 Iowa?

16 A. Yes, I was.

17 Q. How often have you been there?

18 A. I was there once.

19 Q. When were you there?

20 A. I don't recall. It was a few years back.

21 Q. Hmm?

22 A. It was a few years back. I don't recall a specific date.

23 Q. When you say "a few years back", would it have been after  
24 2009?

25 A. Yes, it would have been after 2009.

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1 Q. Okay. So it would have been 2010 or 2011?

2 A. Or thereafter. But --

3 Q. Okay.

4 MR. GARBER: Can I have the picture back?

5 MR. LEWIS: Your Honor, may I ask that the picture --  
6 that you look at the picture as well, so that you can see what  
7 he's seeing?

8 THE COURT: Sure.

9 MR. LEWIS: Thank you.

10 THE COURT: You can have them back, Mr. Garber. I see  
11 a lot of trees and a road.

12 Mr. Lewis, do you want it marked for identification?

13 MR. LEWIS: No, I --

14 THE COURT: It doesn't seem to me we need to but --

15 MR. LEWIS: -- I just wanted you to understand why he  
16 had trouble identifying anything there.

17 THE COURT: Yeah.

18 Q. Now, the Waterloo, Iowa site is an office building that  
19 has an address of 3451 Hammond Avenue, doesn't it?

20 A. Yes.

21 Q. Can you describe the building for us, at that site?

22 A. I'm -- there's a cafeteria. There's different -- there's  
23 a lot of cubes. There's different business units as you walk  
24 down the aisles. Some are property preservation. And they're  
25 segmented by function within the servicing operation.

1 Q. How many people work there?

2 A. I don't know.

3 Q. More than a hundred?

4 A. Yes.

5 Q. How many separate offices are there there?

6 A. I don't --

7 THE COURT: Better use past tense, because --

8 MR. GARBER: Oh, yes.

9 Q. How many separate offices were there there in 2009?

10 A. How many different sites can --

11 Q. Yes.

12 A. -- be identified?

13 Q. Separate offices?

14 A. I'm sorry can you rephrase the --

15 Q. Okay.

16 THE COURT: I don't understand the question either,  
17 because he's talking about -- I think there were cubicles?

18 THE WITNESS: Yes, Your Honor.

19 Q. Okay, so you had cubicles, and a cubicle would maintain a  
20 certain function from another cubicle. Is that correct?

21 A. A cubicle would hold one person who was part of an  
22 operational unit. So --

23 Q. How many people worked for customer care?

24 A. I don't know.

25 Q. Did they have an office manual that they used?

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1 MR. LEWIS: Objection; vague.

2 THE COURT: Overruled. If you know.

3 A. I don't know.

4 Q. Did they have a separate phone system that they used from  
5 the other functions located at 3451 Hammond Avenue?

6 A. I don't know.

7 Q. Did they have different training manuals for each unit  
8 that was located out at 3451 Hammond?

9 A. I don't know.

10 Q. Did they have separate office equipment for each unit that  
11 was located at 3451 Hammond?

12 A. Can you clarify that?

13 Q. Copiers, telephones, intercoms, computers?

14 A. I don't know.

15 Q. Now, someplace, the mail was delivered at 3451 Hammond,  
16 wasn't it?

17 A. Yes.

18 Q. Where was that?

19 A. I don't know specifically.

20 Q. Okay. Do you know who picked up the mail?

21 A. No, I don't.

22 Q. Do you that if each unit that was assigned a duty out at  
23 Hammond, in Waterloo, Iowa, if they had a separate person to go  
24 pick up the mail?

25 A. I don't know.

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1 Q. Now, we have two addresses that are of great interest to  
2 us here today. One of them, I believe, is Post Office Box  
3 1330. Would that be a post office box that was located at a  
4 central location on the 3451 Hammond Avenue address?

5 A. I don't know.

6 Q. And the other post office box that is of interest to us is  
7 4622 -- Post Office Box 4622 of Waterloo, Iowa. Do you know  
8 who picked up that mail?

9 A. No, I don't.

10 Q. Do you know if that post office box was contiguous to  
11 1330?

12 A. I don't know that.

13 Q. Do you even know if there was a separate post office box,  
14 1330 from 4622?

15 A. No.

16 Q. Mr. Cunningham, in your duties for GMACM, and now for  
17 Residential Capital, you were required to file affidavits?

18 A. That was part of my team.

19 Q. Okay. How many affidavits a year do you think you filed  
20 in 2009?

21 THE COURT: Mr. Cunningham personally, or people in --

22 MR. GARBER: No, Mr. Cunningham personally.

23 A. Can you ask the question again.

24 Q. In 2009, how many affidavits did you file?

25 A. I don't know.

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1 Q. Would it be fair to say it was over a hundred?

2 A. Can you -- there were affidavits that were -- more than a  
3 hundred, yes.

4 Q. And did you make any court appearances in 2009 to testify  
5 as a witness for GMACM?

6 A. No, I did not.

7 Q. And since that time, have you made court appearances to  
8 testify in mortgage foreclosures?

9 A. No.

10 Q. You may not remember this, but you were called upon to  
11 file affidavits in Mercer County in the State of New Jersey, in  
12 2011. Do you recall that?

13 A. Can you ask the question again?

14 Q. Pardon?

15 A. Can you ask the question again?

16 Q. I said you were called upon to file an affidavit in the  
17 Chancery Division of the General Equity Part of the Superior  
18 Court of New Jersey in Mercer County in August of 2011. Do you  
19 recall that?

20 A. No, I don't.

21 MR. GARBER: Okay. Your Honor, may I approach?

22 THE COURT: Yes.

23 UNIDENTIFIED SPEAKER: Is this your only copy?

24 THE COURT: Is the document marked for identification,  
25 Mr. Garber?

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1 MR. GARBER: Pardon me?

2 THE COURT: Is the document marked for identification?

3 MR. GARBER: No, it's not, Your Honor. It's a cross-  
4 examination document. I don't think --

5 THE COURT: Well, in my court room, when you show a  
6 witness a document, in order to have a clear record, the  
7 document needs to be marked for identification.

8 MR. GARBER: Yes, Your Honor. I think the last --

9 THE COURT: It has nothing to do with whether it gets  
10 admitted into evidence, but you do not -- I mean, I let you  
11 show the picture of trees, but you're showing him an affidavit.  
12 And before you can show it to him, you should have multiple  
13 copies, you should have it marked for identification.

14 Mark it for identification. I gather that's the only  
15 copy you have?

16 MR. GARBER: Yes, Your Honor, that is. The last  
17 exhibit I had, I believe was 43. Could I mark it as Exhibit 44  
18 for identification?

19 THE COURT: Yes you can.

20 (Affidavit of Mr. Cunningham was hereby marked for  
21 identification as Plaintiff's Exhibit 44, as of this date.)

22 BY MR. GARBER:

23 Q. Could you please take a look at this and see if that's an  
24 affidavit you executed?

25 (Pause)

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1 A. Okay.

2 Q. Is that an affidavit your executed?

3 A. Yes, it is.

4 THE COURT: May I see it, please?

5 MR. GARBER: Sure.

6 (Pause)

7 THE COURT: All right.

8 MR. LEWIS: Your Honor, unless Mr. Garber is going to  
9 try to use this document to impeach the witness, I am having a  
10 hard time seeing the relevance.

11 THE COURT: I haven't heard his next question yet --

12 MR. LEWIS: I understand.

13 THE COURT: -- Mr. Lewis. So your objection is  
14 premature.

15 Q. Now, according to this document you had an interface file  
16 between LoanServ and LPS Desktop, is that correct?

17 A. Yes.

18 Q. And that was true in 2011?

19 A. Yes.

20 Q. And that was also true in 2009?

21 A. Yes.

22 Q. And we looked at the purged loan notes when you were on  
23 direct examination. And I'm going to get to those in a minute.  
24 But some of those entries, I think you testified, were entered  
25 by personnel by GMACM. Is that correct?

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1 A. Can you rephrase the question?

2 Q. I said some of the entries on the purged loan notes that  
3 you went over on direct examination were made by personnel that  
4 worked for GMACM. Is that correct?

5 A. Yes.

6 Q. And many of the entries were made by independent outside  
7 counsel, in this case, in our purged loan notes, David Stern's  
8 office. Is that correct?

9 A. No.

10 Q. He never made any entries into your purged loan notes?

11 A. He made entries into LPS, which went into LoanServ --

12 Q. Okay.

13 A. -- through that interface.

14 Q. So these purged loan notes that we went over, and I'm  
15 going to go over them a little more detail shortly, they are  
16 entries, some were made by General Motors employees -- GMACM  
17 employees, and some were made by David Stern employees?

18 MR. LEWIS: Your Honor, that mischaracterizes his  
19 testimony.

20 THE COURT: Overruled.

21 A. No, the updates were made into the LPS application, by  
22 outside counsel.

23 Q. They're entries that appear in here, right?

24 A. The entries are from LPS in LoanServ.

25 Q. Now, in your affidavit you say that the interface file

1 between LoanServ and LPS Desktop, provides the legal service  
2 provider -- would that be, in this case with the Macks, David  
3 Stern?

4 A. Yes.

5 Q. Okay. With the date of the first missed payment. Is that  
6 correct?

7 A. Yes.

8 Q. Was that also true in 2009, when the Mack foreclosure was  
9 going on?

10 A. Yes.

11 Q. Okay. So automatically he would have been informed of the  
12 date of the first missed payment. Is that correct?

13 A. Sorry, can you rephrase the question?

14 Q. I said automatically, David Stern would have been informed  
15 of the date of the first missed payment by the Macks?

16 A. David Stern would have been provided the contractual due  
17 date of the loan.

18 Q. So he would not have been provided with the date of the  
19 first missed payment from the Macks?

20 A. No, he would be provided the contractual due date at the  
21 time the referral was sent to David Stern's office.

22 Q. The contractual due date of the outstanding principal  
23 balance, which might have been twenty years in the future, or  
24 the due date of the next payment?

25 A. Due date of the next payment.

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1 Q. Okay. He would then been given the date of the default.

2 Is that correct?

3 A. The contractual due date. If it's --

4 Q. And he would have been given the proper parties to the  
5 foreclosure action, correct?

6 A. He would have been provided images and documents from our  
7 imaging system from origination.

8 Q. That he could see who the proper parties to the  
9 foreclosure action were?

10 A. No.

11 Q. So the three elements that you mentioned in your  
12 affidavit, you're saying, do not apply to the Mack case?

13 A. It does. But in the Mack case David Stern requested  
14 who -- from us, who the proper plaintiff should be in the case.

15 Q. Okay.

16 A. The servicing notes.

17 Q. Which would you to lead you to believe, would it not, that  
18 he did not know who the proper parties to the foreclosure  
19 action were?

20 A. Well, that was provided to David Stern --

21 Q. Later on?

22 A. -- through LPS.

23 Q. And earlier in these proceedings we sent out  
24 interrogatories to your counsel, and he provided answers to us,  
25 and I would like to go over those with you now to see if you

1 agree with those answers.

2 MR. GARBER: These interrogatories are dated January  
3 15th, 2015. They were signed by Adam Lewis. I won't show them  
4 to the witness, but I will ask questions about them.

5 Q. Question number 1: What's the name, title, employer and  
6 address of the employee of GMAC who made the first decision to  
7 initiate foreclosure against the Macks? And the answer was, no  
8 natural person made the decision to commence the foreclosure.

9 Do you agree with that response?

10 A. Is there something I can look at.

11 THE COURT: It's just a question.

12 A. Okay. Can you reask the question? I --

13 Q. Okay.

14 A. -- didn't get it.

15 Q. The question that was asked was: What is the name, title,  
16 employer and address of the employee of GMACM who first decided  
17 to initiate the foreclosure against the Macks. And the answer  
18 was: No natural person made the decision to commence the  
19 foreclosure. Do you agree with that?

20 A. Yes.

21 Q. The next question was: Was the decision to initiate the  
22 foreclosure against the Macks by GMACM reviewed by any other  
23 person? If so, provide the name, title, employer, and address  
24 of such person. And in the response it states that the Trust  
25 states that no natural person reviewed the automated decision

1 to initiate the foreclosure. Do you agree with that answer?

2 A. Yes.

3 Q. Okay. Question number 4 was: Why did GMACM elect to  
4 initiate a foreclosure against the Macks in 2009? The response  
5 was: GMACM believes that the triggering of the automated  
6 initiation of foreclosure was the result of the accidental  
7 entry of certain incorrect information in the computer system.

8 Do you agree with that?

9 A. Yes.

10 Q. Do you have a copy of the purged loan notes in front of  
11 you?

12 A. Yes, I do.

13 Q. Okay. I would like to draw your attention --

14 MR. GARBER: And Your Honor, the notes are also found  
15 in my --

16 THE COURT: I have Mr. Lewis' version open, the same  
17 document, I take it?

18 MR. GARBER: Yes.

19 THE COURT: Go ahead.

20 MR. GARBER: Same document, Your Honor.

21 Q. Would you please look at the entry for 10/25/2006?

22 THE COURT: So I'm looking at what Mr. Lewis marked as  
23 Exhibit G.

24 MR. LEWIS: Can you -- counsel, can you give us a  
25 page?

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1 MR. GARBER: Yeah, it's on the first page, 916.

2 Deutsche Bank Bates stamp 916.

3 THE COURT: Okay.

4 Q. Do you see that entry for 10/25/06?

5 A. Yes.

6 Q. A welcome letter eligible. That means that GMAC was, at  
7 that point, in a position to send a welcome letter to the  
8 Macks?

9 A. Yes.

10 Q. And are you familiar with welcome letters?

11 A. No.

12 Q. I'm sorry, what was your response?

13 A. No.

14 Q. Okay. If you would --

15 MR. GARBER: Your Honor, may I approach the witness  
16 and show him a copy of the welcome letter?

17 THE COURT: Go ahead.

18 MR. GARBER: Earlier, I had extra copies of these  
19 logs, and the witnesses were able to use them. Maybe they're  
20 there in front of you.

21 Q. So if you would be so kind as to turn to tab number 3?  
22 And this has been marked Plaintiff's Exhibit for  
23 identification, number 14. Do you have that letter in front of  
24 you, sir?

25 A. Yes.

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1 Q. And the purpose of this letter was to tell the Macks that,  
2 in fact, GMAC Mortgage would be the servicer on their account?

3 A. Yes.

4 Q. And it also gave them an address to write any  
5 correspondence that they may have, didn't it? If you'd look at  
6 the bottom towards -- two-thirds of the way down, you'll see a  
7 mailbox, and to the right of that, an address?

8 A. Where it says "correspondence"?

9 Q. Yes.

10 A. Yes.

11 Q. And that address, in fact, was PO Box 4622 Waterloo, Iowa?

12 A. Yes.

13 Q. Were any other addresses given to the Macks at that time,  
14 to write to, if they had any concerns?

15 A. I don't know.

16 Q. If you would be so kind as to turn to tab number 4 on that  
17 same book? This is a servicing disclosure statement. Are you  
18 familiar with this?

19 A. No, I'm not.

20 Q. And it said the lender was Primary Residential Mortgage,  
21 Inc. Do you see that, sir?

22 A. Yes.

23 Q. Okay. Was that one of the vendors that you handled as a  
24 servicer?

25 A. Not that I'm aware of.

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1 Q. If you would now be so kind as to turn to the next page on  
2 the purged loan notes which is Bates stamped at the bottom  
3 Deutsche 000917? I'll have a question on that page.

4 A. Okay.

5 Q. There's an entry at February 8, 2007, and it says the  
6 transaction type is CBR. Do you know what CBR is?

7 A. I'm sorry, what was the date?

8 THE COURT: I think you misstated the date.

9 Q. 2/9/2007. It's at the top -- second one from the top?

10 A. I don't know what CBR is.

11 Q. To the right of that it's "purchased loan servicing date  
12 10/24/06". Do you see that, sir?

13 A. Yes, I do.

14 Q. Who is it that purchased the loan?

15 A. I don't know.

16 Q. Okay. Did the person that purchased -- or the company  
17 that purchased that loan, did they purchase it from Primary  
18 Residential?

19 A. I don't know.

20 Q. Okay. If you would be so kind as to turn to, on the loan  
21 service -- or the purged loan notes, Deutsche Bates stamp 920  
22 on the bottom right-hand corner?

23 A. Okay.

24 Q. And if you would go down to 4/17/2009, the second entry on  
25 that date, it's an NT entry?

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1 A. Yes.

2 Q. Do you know what NT means?

3 A. No, I don't.

4 Q. And the description opposite that is "B2 seeking to lower  
5 payments, no failed RPPs B2". Do you know who B2 would be?

6 A. That would have been a reference made by -- for borrower

7 2.

8 Q. Okay. Would that be Mrs. Mack?

9 A. I'm not sure in this case.

10 Q. It would be either Mrs. or Mr. Mack?

11 A. Yes.

12 Q. Okay. What is a failed RPP?

13 A. I believe it stands for repayment plans.

14 Q. For what?

15 A. Repayment plans.

16 Q. Okay. And do you know if she was calling about any  
17 options she might have under the federal HAMP program, at that  
18 point?

19 A. No, I don't.

20 Q. If you would be so kind as to look down to the last entry  
21 on the page, also on April 17th, 2009.

22 A. Okay.

23 Q. And that says, "DFLT". Do you know what DFLT is?

24 A. I believe it stands for default.

25 Q. Okay. Default reason: 1 changed to other. Can you tell

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1 us what default that was?

2 A. I don't know.

3 Q. Now, there are numerous blank pages or blank spots on this  
4 page and many other pages. Maybe I need to ask you a little  
5 bit about how the document is set up. On the left-hand side we  
6 have a date. Is that correct?

7 A. Yes.

8 Q. Why is a date put there?

9 A. A date's put for when the transaction takes place within  
10 the LoanServ application.

11 Q. Okay. So some activity occurred on that date?

12 A. Yes.

13 Q. Okay. To the right of that, we have a transaction type,  
14 correct?

15 A. Yes.

16 Q. And that is a code that I presume you have a key for that  
17 you can look at to see what those things are?

18 A. Yes.

19 Q. To the right of that we have a number. It's a transaction  
20 user ID. Is that correct?

21 A. Yes.

22 Q. That's the number of the person or the entity that  
23 actually makes that entry, correct?

24 A. Correct.

25 Q. Now, are those entries all put in automatically, or are

1 they done every time a person or an entity has to make an entry  
2 into the system?

3 A. Can you say the question again?

4 Q. Okay. Are those entries put in automatically whenever  
5 anybody signs on, or does the person or entity who signs on  
6 have to type in the date, type in the code, and type in their  
7 ID number?

8 A. The person or entity performing the transaction has to  
9 make a change within the application -- make a change or update  
10 the application.

11 Q. Now, we're looking still at page 920 and we see many blank  
12 spaces, despite the fact that we have date entries, transaction  
13 type entries and transaction user ID numbers. Why are those  
14 blank spaces there when somebody entered the system?

15 A. I don't know.

16 Q. Do you know who pulled this purged loan note from the  
17 system?

18 A. No, I don't.

19 Q. If you would be so kind as to turn to page 922?

20 A. Okay.

21 Q. And do you see an entry about two-thirds of the way down;  
22 it's dated July 22nd, 2009. It's the third 7/22/2009 entry.  
23 Do you see that, sir?

24 A. Yes.

25 Q. And user number two-thousand-and -- it looks like -- six.

1 Do know who that person is?

2 THE COURT: Actually, 20006, but -- you have another  
3 digit.

4 A. No, I don't know.

5 Q. Okay, 20006. But was that an employee of GM -- of GMACM?

6 A. I don't know.

7 Q. Okay. Whoever it was then put in the following note that  
8 appears to the right of it, correct?

9 A. Can you say that again?

10 Q. I said the person 20006, who made that entry, is the one  
11 that typed in what is to the right, the transaction message,  
12 correct?

13 A. Yes, that's correct.

14 Q. Okay. And that is not necessarily a transcription of the  
15 conversation that that individual, 20006, had with B2, is it?

16 A. I don't understand the question.

17 Q. It's not a direct transcription of what was actually said  
18 by either party, is it?

19 A. It would have been a summary of the discussion.

20 Q. A summary of it.

21 A. Yeah.

22 Q. The summary that was made by 20006, correct?

23 A. Yes.

24 Q. In their own words?

25 A. Yes.

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1 Q. Using abbreviations, correct?

2 A. Yes.

3 Q. And omitting parts that they did not feel were essential  
4 or proper, correct?

5 A. I don't know.

6 Q. Well, you don't really believe that there was a telephone  
7 call from B2 on that date where those words were said in that  
8 way with no other words, do you?

9 THE COURT: I think it's B1. You said B2.

10 Q. Okay, we'll, let's get into it. Can you please read to me  
11 what the message is that 2006 (sic) wanted to transcribe into  
12 this purged loan note?

13 A. That a new CIT 155, borrower 1 struggling to make  
14 payments, stated been using savings, cannot refi. He is on --  
15 house on market, income is only 5,100 a month.

16 Q. Okay. It seemed like you left out a lot there. New  
17 financial with short sale requirement. Do you see that, sir?

18 A. Yes.

19 Q. Okay. Do you know what "WDOYLM" would be an abbreviation  
20 for?

21 A. No, I don't.

22 Q. Okay. So there was a new financial with short sale  
23 requirement. Was GMAC --

24 THE COURT: Requirement or request?

25 MR. GARBER: Pardon?

1 THE COURT: Requirement or request? It's just "REQ".

2 Q. Okay, well, is it request or requirement?

3 A. I believe it would be request.

4 Q. It would have been request. Who made a request to have a  
5 short sale?

6 A. I don't know.

7 Q. Okay. So you're not able to say that B2 made a request  
8 for a short sale, are you?

9 A. It says B1 in the comment.

10 Q. Okay, yes, B1. You're not able to say that B1 made the  
11 request for a short sale, are you?

12 A. No, I'm not.

13 Q. Can you say that the person who talked to B1 did not  
14 request that B1 procure a short sale?

15 A. I don't know.

16 Q. Okay. It goes on to say, "Account current". Is my  
17 translation of those abbreviations correct?

18 A. I'm sorry?

19 Q. ACC -- ACCT current?

20 A. Yes.

21 Q. Okay. So would the operator 20006 have told B1 that the  
22 account was current?

23 A. For this comment specifically, it refers to -- I'm sorry,  
24 yes.

25 Q. So B1 would have been informed at that time, the account

1 was current, right?

2 A. Yes.

3 Q. And then after that, there's a slash mark -- "wanted to  
4 know if CL" -- is something cut off there?

5 A. I don't know.

6 Q. When the purged loan notes were sought from the system to  
7 produce this record, were many portions of the typed in  
8 transcription and summary of the conversations cut out?

9 A. I don't know.

10 Q. Okay. If you would be so kind as to turn to page 923?  
11 And I'd like for you to look at the entry for July 22nd, 2009.  
12 It's about five entries down from the top, and it is the fifth  
13 entry for 7/22/2009. The transaction type is DM. Do you see  
14 that, sir?

15 A. Yes.

16 Q. It says something about -- is that a continuation from two  
17 lines up where it says "House been on the market for two  
18 years"?

19 A. Yes.

20 Q. And then after the "two years", there's a slash:  
21 "refusing to do SPO". What is SPO?

22 A. Short payoff.

23 Q. Pardon?

24 A. A short payoff.

25 Q. What's a short payoff?

1 A. Similar to a short sale.

2 Q. Okay. So whoever this person was that was talking to the  
3 General Motors employee -- GMACM employee -- that person was  
4 refusing to do a short sale that the employee was requesting?

5 A. I believe this implies that the customer may have been  
6 suggesting that.

7 Q. May have been what?

8 A. Stating that they didn't want to do a short payoff.

9 Q. Yes. Why was the language used "refusing to do a SPO"?

10 A. I don't know.

11 Q. Would it be fair to say that in any case, this note  
12 indicates that one of the Macks was talked to and that they did  
13 not want a short sale on their property?

14 A. At that time, yes.

15 Q. If you will look down about the middle of the way down the  
16 page --

17 THE COURT: Before you go on, Mr. Garber, I just -- so  
18 the same user ID entered the first six lines on this page,  
19 Bates 923, but there are different transaction types  
20 identified. Can you just explain to me is that one continuous  
21 entry? It's the same operator who entered them, but some of  
22 them seem to be continuations, but they're different  
23 transaction codes. Why would that be?

24 THE WITNESS: I --

25 THE COURT: So the first one is --

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1 THE WITNESS: I think --

2 THE COURT: -- NT, and then CIT, then DM, then NT,  
3 then DM, then DM

4 THE WITNESS: I think when comments were made in one  
5 particular day, when the history comes back, it doesn't come in  
6 order. So I think you're seeing multiple different actions  
7 taken by this one particular person, but when the history is  
8 pulled, it comes back in different ways. So it doesn't come in  
9 order.

10 THE COURT: Is this one continuous entry or separate  
11 entries? Can you tell? Do you understand what I'm asking?

12 THE WITNESS: Yes.

13 THE COURT: The same user entered the information  
14 that's on the first six lines, and I just want to understand  
15 whether -- and there are different transaction types for each  
16 line. And would it have been entered in the single entry by  
17 the user ID -- by the user?

18 THE WITNESS: It would have been separate entries from  
19 the user. So it -- some of the comments are -- relate to the  
20 discussion that took place, and other, such as CIT, which  
21 stands for customer inquiry tracking, was used to send and --  
22 send a request from that particular person. So it was an  
23 action taken from the discussion.

24 THE COURT: Tell me, what does CIT mean?

25 THE WITNESS: Customer inquiry tracking.

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1 THE COURT: What's that mean?

2 THE WITNESS: It was used within the LoanServ  
3 application to send a notification to a different business unit  
4 or operation outside of that particular person's  
5 responsibility. So if another task needed to be done, you  
6 would use a CIT.

7 THE COURT: Go ahead, Mr. Garber.

8 BY MR. GARBER:

9 Q. Mr. Cunningham, if you would be so kind now as to look  
10 down about, oh, perhaps twelve entries, to an entry for July  
11 23rd, 2009, and it bears the transaction type FOR. It may be  
12 the first one that we have in this purged loan notes. Do you  
13 see that, sir?

14 A. Yes.

15 Q. And this is transaction -- user number 31938. I think  
16 you've already been asked if you know who that is, and you  
17 don't, do you?

18 A. No, I don't.

19 Q. To the right of that it says "approved for foreclosure,  
20 7/23/09". Do you see that, sir?

21 A. Yes.

22 Q. And is that what it means, that this loan, at that time,  
23 on July 23rd, 2009, was approved by user number 31938 for  
24 foreclosure, correct?

25 A. That user populated a field that was called "approved for

1 foreclosure" on that date.

2 Q. Okay. And that was one day after an employee of GMACM was  
3 in touch with the borrower and the borrower refused to do a  
4 short sale, correct?

5 A. Correct.

6 Q. And that was a few days after GM had -- GMACM had assured  
7 the borrower that their account was current, correct?

8 A. Correct.

9 Q. Now, when these users -- transaction users come on to the  
10 computer, do they have the benefit of all this information in  
11 front of them?

12 A. Can you rephrase the question?

13 Q. Okay. When the user -- you have a transaction user that  
14 comes onto the computer to make an entry on the computer  
15 concerning the telephone call that they had with the customer,  
16 do they have the benefit of all this information that we have  
17 on the purged loan notes?

18 A. When referring it to foreclosure?

19 Q. No. I'm talking about, let's say, Mr. Mack calls up,  
20 wants to know if his loan is current, and so the operator that  
21 he's talking to calls up on the computer, his account, to find  
22 out if it's current and do they have the benefit of all this  
23 history that we do on the purged loan notes?

24 A. Yes, they will.

25 Q. Okay. If you'll look down on 7/24/2009, this is the first

1 transaction that is labeled an MFR. Do you see that, sir?

2 A. I'm sorry, what date?

3 Q. It's on 7/24 of '09?

4 A. Yes.

5 Q. Okay. The transaction type MFR, and the transaction user  
6 ID is 00578. Do you see that, sir?

7 A. Yes.

8 Q. And it says, "at that time, MERS was notified". Is that  
9 foreclosure?

10 A. Yes, it is.

11 Q. "Foreclosure reinstated on 7/24/09." Had it been  
12 instituted before and held up?

13 A. I don't know.

14 Q. Okay. But on that date, it was reinstated, correct?

15 A. Yes.

16 Q. Okay. And MERS was notified of that?

17 A. Yes.

18 Q. And MERS is -- well, tell us what MERS is?

19 A. MERS refers to Mortgage Electronic Registration System.

20 Q. Okay. And they're an organization that keeps track of  
21 notes and mortgages and ostensibly it's supposed to handle  
22 those, correct?

23 A. No.

24 Q. What do they do?

25 A. They're -- I believe, generally speaking, their

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1 responsibility is to track or keep track of the mortgage and  
2 any assignments that take place thereafter and maintain those  
3 electronically.

4 Q. Okay. And a servicer such as GMACM will notify them  
5 whenever there's a major event on that mortgage?

6 A. I don't know.

7 Q. Okay. You never worked with MERS?

8 A. Not within foreclosure or my operation, no.

9 THE COURT: What's the code MFR?

10 THE WITNESS: I don't know.

11 Q. If you --

12 THE COURT: What's "foreclosure reinstated" mean?

13 THE WITNESS: I believe it's referring to the fact  
14 that the foreclosure was closed out a few entries above, where  
15 it says file closed 1000 completed --

16 THE COURT: Yes.

17 THE WITNESS: That that was the "MERS notified  
18 foreclosure reinstated" is just evidencing that the foreclosure  
19 is now closed in the LoanServ application.

20 Q. If you would now look down at another entry that appears  
21 on July 24th, 2009, and it is the fourth of the transaction  
22 type FOR. Do you see that, sir?

23 A. Yes, I do.

24 Q. Okay. And to the right of it is user number 01122,  
25 correct?

1 A. Correct.

2 Q. That would have been David Stern's office?

3 A. That would have been the LPS process management system.

4 Q. Okay. So that is -- in your affidavit you referred to an  
5 LPS system. That's what you're referring to, correct?

6 A. Yes.

7 Q. Okay. And it says, "User has updated the system for the  
8 following event: file received by attorney, completed on July  
9 24th, 2009." Do you see that, sir?

10 A. Yes, I do.

11 Q. So the causation of that entry was from David Stern's  
12 office, and not from GMACM, correct?

13 A. Correct. That was David Stern acknowledging receipt of  
14 the file that went to him in LPS.

15 Q. What file went to him?

16 A. It is an electronic file that was opened in the LPS system  
17 from the approval for foreclosure that occurred in LoanServ.

18 Q. Okay. And would it have a copy of the mortgage?

19 A. That would have been provided to David Stern at the time  
20 it was referred.

21 Q. At that time?

22 A. Yes.

23 Q. So when he received it, he would have had a copy of the  
24 mortgage, right?

25 A. Correct. If it was available in our imaging system, yes.

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1 Q. Okay. It was your practice to send out copies of the  
2 mortgage when you sent a file out to a service provider like  
3 David Stern, for foreclosure, wasn't it?

4 A. It was, yes.

5 Q. And you would have sent out a copy of the note at that  
6 time, would you not?

7 A. If it was available in imaging, yes.

8 Q. Okay. And you would have sent out any other documentation  
9 that you felt was necessary to institute this foreclosure,  
10 correct?

11 A. Yes.

12 Q. Okay. And these would have all been electronic images?

13 A. Not in this particular case?

14 Q. Oh, in this particular case you actually put it in the  
15 mail and he received it?

16 A. He was provided the original note and mortgage at -- after  
17 the referral.

18 Q. Okay. So I'm talking about this entry. This entry was --  
19 THE COURT: How do you know that?

20 THE WITNESS: Just through the history notes. Sorry.

21 If you refer to page 10 in Exhibit G --

22 THE COURT: Yes.

23 THE WITNESS: -- toward the bottom, it's probably  
24 about the tenth entry from the bottom --

25 THE COURT: Yes.

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1 THE WITNESS: -- it says, "User has updated the system  
2 for the following event. Original note sent to attorney.  
3 Completed on 8/5/2009."

4 THE COURT: Okay.

5 THE WITNESS: And then further down, you see that  
6 "sent original note, original recorded mortgage."

7 THE COURT: All right, thank you.

8 THE WITNESS: Thank you.

9 Q. Okay. So I want to be clear, on this entry that we find  
10 on Deutsche Bank 923, this was an electronic transmission to  
11 him, or this was a paper transmission?

12 A. It was an electronic transmission.

13 Q. Okay. Okay. Now, further down the page, we'll see an  
14 entry also for 7/24, and it says -- it's by 01122 --  
15 "foreclosure (NIE) ID number" -- gives a number -- "sent to the  
16 Law Offices of David Stern at 7/24/2009, 1:52 p.m." Do you see  
17 that?

18 A. Yes.

19 Q. Okay, what does that number mean, NIE ID number?

20 A. I don't know.

21 Q. Is that a FedEx number?

22 A. I don't know.

23 Q. Okay. Would that have been to differentiate it from the  
24 electronic transmission? Would that have been the paper, that  
25 is, the actual note, the mortgage and any other documents that

1 you needed to send, you would have sent on that date, to David  
2 Stern?

3 A. Can you ask the question again?

4 Q. Okay. My question was, this entry that we're looking at  
5 now, for 7/24/2009, would that be evidence that, in fact, GMACM  
6 sent the note and mortgage and other paper documentation to  
7 David Stern?

8 A. No.

9 Q. Well, they had already sent the electronic transmission to  
10 him earlier. So why now do we have this entry?

11 A. The electronic referral provided information, but LPS also  
12 had an imaging system --

13 Q. Yeah.

14 A. -- that went with it, which was New Image Express.

15 Q. Okay.

16 A. And I believe this code reference images being provided to  
17 them at the time of referral.

18 Q. Why do you believe that?

19 A. I believe the NIE refers to New Image Express.

20 Q. Oh, okay. Okay. If you would now, please turn to page  
21 924, the next page. That's Deutsche 924.

22 A. Okay.

23 Q. And if you look about eight lines down from the top,  
24 you'll see on July 27th, 2009, user -- transaction user number  
25 01122 put in the following thing: "Uploaded comment, file

1 received." Do you see that, sir?

2 A. Yes.

3 Q. Now, does that mean that in fact, the electronic  
4 transmission that we saw on the previous page, which you said  
5 was the NIE number, does that mean that in fact, David Stern,  
6 at that time, acknowledged receipt of that electronic  
7 transmission?

8 A. Yes.

9 Q. Okay. And just to be sure, that electronic transmission  
10 would ordinarily had the mortgage and the note in it?

11 A. It would have -- if the image was available in our imaging  
12 system, it would have been the note, the mortgage, and the  
13 title policy.

14 Q. Okay. And do you know whether those things were  
15 available?

16 A. I don't know if the images were available.

17 Q. Well, shouldn't they have been available before you send  
18 them out to an attorney?

19 A. Yes.

20 Q. Okay. And do you have any reason to believe that they  
21 were not sent, at that time, the image of the note and  
22 mortgage?

23 A. No.

24 Q. Okay. And as a matter of fact, that would have been the  
25 usually process, wouldn't it?

1 A. Yes.

2 Q. Okay. Please look down about two-thirds of the way down,  
3 there's an entry for July 29th on foreclosure, and it's by user  
4 number 01122. And it says "Off issue comments. Please advise  
5 as to what name we are to foreclose in, ASAP, status active."  
6 Do you see that, sir?

7 A. Yes.

8 Q. Would that have been a note on your program with David  
9 Stern, that in fact he wanted GM to tell him what name to  
10 foreclose this loan in?

11 A. Yes.

12 Q. Okay. And that's because David Stern apparently did not  
13 know what name to close it in -- foreclose it in, did he?

14 A. No.

15 Q. Was that because he found a problem with the paperwork  
16 that was sent to him?

17 A. No, it was, at times, you know, customary to a certain  
18 extent, for foreclosure counsel to reach out to us to ask that  
19 specific question.

20 Q. Well, how do you know that's what happened here as opposed  
21 to there being a problem that he was aware of?

22 A. Because I recall the process that we had in place in the  
23 foreclosure operation.

24 Q. But you don't know anything about this particular  
25 foreclosure, do you?

1 A. Not this specific instance, no.

2 Q. And your knowledge is the same that we would have by  
3 looking at these notes, except that you know what the  
4 abbreviations are, right?

5 A. I know the processes and procedures we had in place within  
6 the foreclosure operation to communicate with counsel.

7 Q. Okay. And so the processes and procedures stated that you  
8 would ordinarily have sent the mortgage and the notes and all  
9 the documents to him by electronic transmission?

10 A. Yeah.

11 Q. Correct? Okay. Now, go down about ten places from that  
12 entry, and you'll see on July 29th, this entry: "S foreclosed  
13 Deutsche Bank Trust Company Americas as trustee for RALI 2007  
14 QS3 Trust." Do you see that, sir?

15 A. Yes.

16 Q. That is the notification by the GM employee -- GMACM  
17 employee to David Stern that out of those papers that he got,  
18 he should select the name of Deutsche Bank as the plaintiff in  
19 the foreclosure suit, correct?

20 A. No.

21 Q. Okay. So GM was not informing David Stern of the proper  
22 name to bring the foreclosure suit in?

23 A. Yes, they were.

24 Q. They were. Okay. Now, was that an automated task that  
25 the computer automatically picks a name to bring the

1 foreclosure in?

2 A. No.

3 Q. So that was a person that made this entry, correct?

4 A. Yes, it was.

5 Q. Okay. So that was a knowing, breathing, thinking person  
6 who had access to this entire screen, and should have known the  
7 history, and they made a conscious decision to tell David Stern  
8 which name to use for the plaintiff?

9 A. In the LPS application, yes.

10 Q. Okay. Now, what other name could the foreclosure have  
11 been brought in, given the paperwork that you had?

12 A. I don't know.

13 Q. Okay. Because -- do you know what the paperwork was that  
14 you had at that time?

15 A. Not for the Mack case, no.

16 Q. Okay. Okay, if you'll please to the next page, 925? And  
17 you'll see an entry at the top, third line down, 7/29/2009. Do  
18 you see that, sir?

19 A. Yes.

20 Q. And it's an entry again by 01122. Would that have been  
21 instigated by the Stern office?

22 A. Yes.

23 Q. Okay. And the comment -- uploaded comment is this: "7/29  
24 AWT". Is that "await"?

25 A. Yes.

1 Q. And then the next one is "PLNTF". Is that plaintiff?

2 A. Yes.

3 Q. And then the line beneath that says "info". That's  
4 information, right?

5 A. Yes.

6 Q. Okay. "via NT". What is NT?

7 A. NT is the prior name of the LPS application. It used to  
8 be known as New Track.

9 Q. Okay. And in parenthesis, they have "DIS" (sic). What is  
10 that?

11 A. That refers to David J. Stern's office.

12 Q. Okay. So at the time that that entry was made, they were  
13 still awaiting the information for which the plaintiff should  
14 be in this foreclosure suit, correct?

15 A. It all happened the same day --

16 Q. Yes.

17 A. -- so I don't know if that was done before or after.

18 Q. Well --

19 A. Chronologically.

20 Q. -- when we have multiple entries on the same day, wouldn't  
21 they appear chronologically as the dates appear  
22 chronologically?

23 A. Not in the LoanServ history notes here, no.

24 Q. Okay. Okay, if we go down about ten more lines, we'll see  
25 an entry on the 7/30/2009, again by this user 01122, uploaded

1 comment: "Plaintiff info received DIS". Do you see that, sir?

2 A. Yes, I do.

3 Q. So is that David Stern acknowledging that now they know  
4 who to file the suit in -- in whose name to file the suit,  
5 correct?

6 A. Yes.

7 Q. Okay. And that's because somebody at GM looked over the  
8 file and decided which is the proper name and communicated that  
9 information with David Stern's office, correct?

10 A. They looked at a document that would have provided them  
11 the beneficiary information for this particular investor, and  
12 provided that through LPS.

13 Q. Okay. Now, if you'll please look down about another  
14 twelve or fourteen lines, and here's an entry that appears on  
15 August -- it looks like August 5th, 2009, with an FOR signature  
16 by user number 01122. And to the right of it, it says, "User  
17 has updated the system for the following event. Original note  
18 sent to attorney completed on 8/5/2009." Do you see that, sir?

19 A. Yes.

20 Q. Okay, now was that David Stern saying that the note was  
21 sent, or was that General Motors saying the note had been sent?

22 A. General -- GMAC Mortgage.

23 Q. Okay. So on that date, somebody at GMACM took the  
24 original note, original mortgage, put it in an envelope, and  
25 they sent it to David Stern, correct?

1 A. Yes.

2 MR. LEWIS: Your Honor, the witness has been up a long  
3 time, I wonder if we could take a short break?

4 THE COURT: No, we'll go until 12:30 and take a lunch  
5 break then.

6 MR. LEWIS: Very well, Your Honor.

7 THE COURT: We had a recess earlier.

8 MR. LEWIS: Thanks.

9 Q. Okay. And then if you go down about eight lines up from  
10 the bottom, there's a note on 8/5/09 by 01122 that says, "Sent  
11 original note, original recorded mortgage and original title to  
12 David Stern, FedEx number," and then they give a number.

13 Correct? Do you see that, sir?

14 A. Yes.

15 Q. So that's where that employee of GM would have actually  
16 put it in an envelope and sent it out with a tracking number,  
17 so they could make sure they don't lose their note and  
18 mortgage, right?

19 A. Yes.

20 Q. Okay. On the next page, this is Deutsche Bank 926, if you  
21 will look about twelve lines down from the top, an entry on  
22 8/10/2008 (sic), FOR, where it says "User has updated the  
23 system for the following event: Attorney received original  
24 note, completed on 8/10/2008 (sic)". Do you see that, sir?

25 A. Yes.

1 Q. That's the acknowledgement by Stern's office that they now  
2 have the paperwork in their office, not an electronic image,  
3 correct?

4 A. Yes.

5 Q. Okay. Why do we have a similar entry about eight lines  
6 down where it says, "User has updated the system for the  
7 following event. Attorney received original note. User  
8 changed." Is that just to acknowledge separately the note as  
9 opposed to the mortgage?

10 A. Yes.

11 Q. But the note and mortgage would have been sent together,  
12 correct?

13 A. Yes.

14 Q. Would you please look down about three-quarters of the way  
15 down, maybe ten entries up from the bottom, there's a note from  
16 8/11/2009, CIT, user number 15732, and it says, "Fax received  
17 hardship letter." Do you see that, sir?

18 A. Yes.

19 Q. Do you know what letter that is?

20 A. No, I don't.

21 Q. Was that a letter where the Macks were trying to get some  
22 help from GM to get their payments lowered so they wouldn't be  
23 exhausting their savings?

24 A. I don't know.

25 Q. And would you please look to the second line up from the

1 bottom on 8/11/2009, it's DM entry by number 15732, "Default  
2 reason 3 changed to excessive obligations." Do you see that,  
3 sir?

4 A. Yes, I do.

5 Q. Do you know what the refers to?

6 A. No, I don't.

7 Q. Does that refer to the foreclosure?

8 A. No.

9 Q. What?

10 A. No, it doesn't.

11 Q. What does it refer to, then?

12 A. I believe it refers to the loss mitigation activity.

13 Q. And why would you say that?

14 A. Because the CIT refers to -- above, that you referenced  
15 earlier, refers to a financial statement, and those activities  
16 are associated with loss mitigation activity.

17 Q. Okay. So when the time --

18 THE COURT: Just hold on a second.

19 (Pause)

20 THE COURT: I just need to make a note to myself.

21 Go ahead, Mr. Garber.

22 Q. So on August 11th, 2009, GMACM knew that the Macks were  
23 not going to qualify for a loan modification under the HAMP  
24 program because they had excessive obligations, correct?

25 A. I don't know.

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1 Q. Why would they put that in there if it weren't so?

2 A. I don't know.

3 Q. Okay. Please turn to the next page, 927. And we see an  
4 entry about fifteen lines down from the top. It's dated  
5 8/13/2009, foreclosure, user number is 01122. And to the right  
6 of it it says, "uploaded comment, file to attorney." Do you  
7 see that, sir?

8 A. Yes.

9 Q. What file went to the attorney?

10 A. I don't know.

11 Q. Did GMACM make that entry?

12 A. No.

13 Q. Did David Stern's office make that entry?

14 A. Yes.

15 Q. So can you say -- is that an acknowledgement that they  
16 received the file on that date?

17 A. I don't know.

18 Q. Okay. If you go two-thirds of the way down, you'll see  
19 many, many different entries, all bearing different transaction  
20 user IDs with a blank space opposite. Do you see that?

21 A. Yes.

22 Q. Why would those employees of GMACM come online, take the  
23 trouble to put in a code, put in their transaction user ID  
24 number, and then just go blank and put in nothing?

25 A. I don't know.

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1 Q. Okay.

2 THE COURT: Mr. Lewis, I would appreciate it if you  
3 would find out whether this document was redacted.

4 MR. LEWIS: I will be happy to do that. And the  
5 reasons if it was --

6 THE COURT: Yes.

7 MR. LEWIS: -- and if it's not privileged information,  
8 supply the information.

9 THE COURT: Thank you.

10 Q. Okay. If you'll look up about ten from the bottom, on  
11 August 17th, 2008 (sic), it says, foreclosure, again this  
12 entity 01122 -- and by the way, that could be David Stern's  
13 office or that could be GMACM using that same user ID number,  
14 right?

15 A. Yes.

16 Q. Okay. So this particular one says, "System updated for  
17 the following event. User has reprojected the step, complaint  
18 filed to 8/25/2009." Do you see that, sir?

19 A. Yes.

20 Q. Okay. Why did they have to reprogram the date of filing  
21 the complaint?

22 THE COURT: It's reprojected. It doesn't say  
23 "reprogrammed".

24 Q. Let's see. Let me try to have -- oh. I'm sorry, the word  
25 was "reprojected". I think -- did they project it before?

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1 A. No, it's a set date at the time that the loan is referred.

2 Q. Okay. If you go down to the fourth entry up from the  
3 bottom, on August 18th, 2009, uploaded comment -- that  
4 indicates it came from David Stern's office, doesn't it?

5 A. For what entry? I'm sorry.

6 Q. Fourth one up from the bottom, 8/18/2009 user number  
7 01122?

8 A. That, in connection with the next one, yes. Uploaded  
9 comment, correction completed, 8/17/09 DIS.

10 Q. Okay. Some correction was made at that point, correct?

11 A. I don't know.

12 Q. You don't know what the correction was?

13 A. I do not.

14 Q. Okay. Was that a correction that David Stern had to make  
15 in his foreclosure papers?

16 A. I don't know.

17 Q. If you'll please be so kind as to turn to the next page?  
18 This is Deutsche Bank 928, bottom right-hand corner. And if  
19 you look at the entry about ten from the top, it's the DM  
20 entry, the user number is 31243. I believe it's the first one  
21 on that page. Do you see that entry, sir?

22 A. Yes.

23 Q. It has "TT". What does "TT" mean?

24 A. Talk to.

25 Q. And then B2 -- that's borrower 2?

1 A. Yes.

2 Q. And then "VI". What is "VI"?

3 A. I don't know.

4 Q. Is the next one, "advised that received foreclosure  
5 notice"?

6 A. Yes.

7 Q. Comma, "and letter advising to get attorney." Is that  
8 correct?

9 A. Yes.

10 Q. "Advised not in foreclosure." Is that what that means?

11 A. Yes.

12 Q. So somebody at GM was telling the Macks that they were not  
13 in foreclosure, correct?

14 A. Correct.

15 Q. And then after they told the Macks that they were not in  
16 foreclosure, there's this comment: "But LPS shows FC moving."  
17 Do you know if this operator told the Macks that LPS showed  
18 foreclosure moving?

19 A. Can you ask the question again?

20 Q. Okay. Do you know if this operator that was talking to  
21 the Macks, B2, did they also advise them that LPS shows  
22 foreclosure moving?

23 A. The comment suggests that that was being told to the  
24 Macks, yeah.

25 Q. And how do you know that it wasn't just a comment that the

1 operator put in so people at GM would know what the status is?

2 A. I don't. But the next entry that's associated with that  
3 says, "Will e-mail Mod Rep to see if accurate".

4 Q. Pardon?

5 A. I said the next entry associated with that teller is that  
6 they will e-mail Mod Rep to see if accurate.

7 THE COURT: What's the Mod Rep?

8 THE WITNESS: The modification associate in loss  
9 mitigation.

10 Q. Okay, so on 8/20 your operator at GM could look at this  
11 screen and see that the corrections had been made to the file  
12 by David Stern; that the complaint was sent for filing; knew  
13 that it was sent for filing; and then that person would tell  
14 the Macks that they're not in foreclosure, correct?

15 A. No.

16 Q. That's not what that note says?

17 A. Not how you described it.

18 Q. Okay. Please look down about twelve lines from the  
19 bottom. There's an entry at 8/25/09, a foreclosure entry and  
20 it's by this entity 01122. Do you see that?

21 A. Yes.

22 Q. And opposite that it has, "Prepped docs in-house." Do you  
23 know who made that entry? David Stern or GMACM?

24 A. That would have been David Stern.

25 Q. Okay. Why would he say, David Stern, that he prepped docs

1 in-house?

2 A. That goes along with the comment above where it says,  
3 "Uploaded comment: Awaiting FIGS ALM, prepped docs in-house."

4 Q. What does that mean, "Awaiting FIGS ALM"?

5 A. I believe it refers to awaiting figures for judgment --  
6 judgment figures, so --

7 Q. Okay.

8 A. -- amount to include in the judgment.

9 Q. What doc would David Stern have prepped? He's already  
10 sent the file out for foreclosure. What documents would he be  
11 prepping now?

12 A. The affidavit.

13 Q. The affidavit?

14 A. Yes.

15 Q. The affidavit of what?

16 A. Judgment.

17 Q. To justify how much the figures would be -- the principal  
18 balance, the interest, and all that sort of thing?

19 A. Yes.

20 Q. Okay. If you'd go down to the second line from the bottom  
21 on 8/26, it's an entry by 11555. That's a GMACM employee,  
22 correct?

23 A. Yes.

24 Q. And TT, again, talked to B2-BI, and advised of DD 82 said  
25 getting for noticed. Do you know who advised what of DD 82 --

1 or DD B2?

2 A. I don't know.

3 Q. Okay. On the next page, 929, at 8/26/2009, transaction  
4 user number at the top, 12700 says that B1 called re letter-fax  
5 Cheryl Mack. Does that mean that either Mr. Mack or Mrs. Mack  
6 called GM with a question about a letter that was either faxed  
7 to them or they faxed?

8 A. I don't know.

9 Q. You don't know what letter that refers to?

10 A. No.

11 Q. If you would look down about ten lines down, there's an  
12 entry on 8/26/2009, it's an NT entry, it's again by 12700, and  
13 says, "Letter 2:31". Do you see that?

14 A. Yes, I do.

15 Q. What letter is being referred to as 2:31?

16 A. I don't know.

17 Q. So that you don't know if that was a letter the Macks were  
18 sending to GM or GM was sending to the Macks?

19 A. The comment refers to they could not be of assistance, she  
20 wanted a letter stating that the loan was current.

21 Q. Okay. And --

22 A. And --

23 Q. -- if you look down about eight lines further from that,  
24 on 8/26/2009, NT operator number or user number said at -- at  
25 12700 said, "Copy not mailed to customer." Do you see that,

1 sir?

2 A. Yes.

3 Q. Was there supposed to be a letter that the Macks were  
4 requesting that GM would notify them in writing that at that  
5 time their account was not delinquent, it was current. Was  
6 that a letter they were asking for?

7 A. Can you ask the question again?

8 Q. Okay. Do these messages mean that the Macks were  
9 requesting that GMACM provide them with a letter in writing  
10 that their account was not in default and it was, in fact,  
11 current?

12 A. Yes.

13 Q. Okay. Do you know -- and we see the letter was not mailed  
14 to the Macks, correct?

15 A. Well, it appears from the entry that the letter was faxed.

16 Q. Okay, so a letter was faxed to them. A letter was faxed  
17 to them telling them -- somebody at GM prepared a letter saying  
18 that your account is current, you are not in default, correct?

19 A. I don't know.

20 THE COURT: Where is that entry? I'm just -- I've  
21 lost you. Sorry.

22 MR. GARBER: I was -- Your Honor, I was looking at the  
23 entry that followed 8/26/2009 by NT, that's 12700, "Letter  
24 stating that the loan was current faxed."

25 THE COURT: Which line -- I'm not even sure what part

1 of the page.

2 MR. GARBER: Let me count them down. It's about  
3 thirteenth line from the top.

4 THE COURT: Okay, thank you. I've got it now. Go  
5 ahead.

6 Q. Okay. Another letter is referred to about ten lines down  
7 further. This is on 8/26/2009, transaction type NT, user code  
8 12700, "B1 called re letter faxed." Is that what those  
9 abbreviations mean?

10 A. Yes.

11 Q. Okay. "Cheryl Mack", and then a fax number was given. Is  
12 that the fax number of Cheryl Mack?

13 A. I don't know.

14 Q. Okay. And then it goes on to say "Copy not mailed to  
15 customer." So do you believe from this there was a letter  
16 prepared by GM saying that they were current, it was not mailed  
17 to the Macks, but that it was faxed to them, and then Cheryl  
18 Mack called back to discuss it?

19 A. Can you ask the question one more time?

20 Q. Okay. Do you believe, from these transaction entries,  
21 that in fact, either Mr. Mack or Mrs. Mack called up GMACM to  
22 find out if they could get proof from GMACM that their account  
23 was current and not delinquent, and that GMACM, in response to  
24 that, prepared a letter saying that their account was current  
25 and not delinquent, it was faxed to Mrs. Mack, and not sent?

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1 Is that what all that means?

2 A. Yes.

3 Q. Okay. And then she called back to talk about the letter  
4 that had been faxed to her or was supposed to be faxed to her,  
5 correct?

6 A. I don't know.

7 Q. Okay. If we go down about two-thirds of the way down,  
8 we'll see an entry for 8/26/2009, and it bears the transaction  
9 type of OL, and it's again this operator 12700. Do you see  
10 that, sir?

11 A. Yes.

12 Q. And it says WDYCUS (ph.) confirm account current." Maybe  
13 you told us before, I don't remember. What does WDYCUS mean?

14 A. I don't know.

15 Q. Okay. But in any case, the operator confirmed to somebody  
16 that the account was current at that time, right?

17 A. I don't know.

18 Q. I just have to ask, if you have an operator that's  
19 handling this account and they see that the account is in  
20 foreclosure but the account is current and they're talking to  
21 Cheryl Mack and telling her her account is current, we'll send  
22 you a letter proving it, wouldn't that employee do something to  
23 inquire and derail this foreclosure?

24 A. I don't know.

25 Q. You train them. You supervise them.

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1 A. The foreclosure operation. But these comments come from  
2 different areas within other business units.

3 Q. Okay. Okay, if we turn to --

4 THE COURT: We're going to take our lunch break now.

5 MR. GARBER: Okay, sure.

6 THE COURT: All right, 2 o'clock.

7 Do you have an estimate of how much further -- more  
8 cross-examination you have?

9 MR. GARBER: I will try to curtail it, but it may be  
10 as much as an hour.

11 THE COURT: Okay. See you all at 2.

12 (Recess from 12:31 p.m. until 2:04 p.m.)

13 THE COURT: All right, please be seated.

14 All right, let's continue with cross-examination.

15 BY MR. GARBER:

16 Q. Mr. Cunningham, I believe I was asking you some questions  
17 from the purged loan notes. I was last looking at Deutsche  
18 Bank 930 at the bottom right-hand corner.

19 If you would please look at that page. I don't think I've  
20 asked you about this question, but there's an item about twelve  
21 up from the bottom. It's dated 9/23/09, with a transaction  
22 type FOR and a transaction user ID 01122. And then the  
23 uploaded comment is, "Original note and mortgage TP returned  
24 file to dismissals." Do you see that, sir?

25 A. Yes, I do.

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1 Q. And did I read that right with the abbreviations spoken  
2 out?

3 A. It would be original note and mortgage and title policy.

4 Q. And title policy?

5 A. Correct.

6 Q. Okay. So that was a note that was entered by David Stern  
7 on this document, correct?

8 A. Yes.

9 Q. And then if we go down to the third from the bottom on  
10 10/5/2009, it's an NT note, and the handler or transaction user  
11 is 22378. Do you see that, sir?

12 A. Yes.

13 Q. Okay. And it says, "B2" -- is that B2 called re the  
14 3,629-dollar charge in the MSA, advised expense." Did I read  
15 that right?

16 THE COURT: I don't think so. I don't think it's MSA.

17 Q. I'm sorry, can you read it to us and tell us what it says?

18 A. Borrower 2 called in regarding the 3,629-dollar charge in  
19 the mortgage account statement. Advised expense."

20 Q. Okay. And what did you say the MAS meant?

21 A. Mortgage account statement.

22 Q. Mortgage account statement. Okay. So did, in fact, B2,  
23 who was either Mrs. Mack or Mr. Mack, did B2 get charged 3,629  
24 dollars?

25 A. I don't know.

1 Q. Okay. Do you know what that charge is for?

2 A. I do not.

3 Q. If you would now please turn to 931? And if you will look  
4 about --

5 THE COURT: Just hang on a second.

6 Look at the last entry on the page -- on that same  
7 page, Bates 930. Could you read that entry?

8 THE WITNESS: Borrower 2 called in, inquiring about  
9 expense advance fee; transferred to loss.

10 THE COURT: Does that relate to the line two lines  
11 above?

12 THE WITNESS: No, it's not. It's a separate  
13 transaction. Both transactions are continued on the next page.

14 THE COURT: All right.

15 THE WITNESS: And it'll complete the thought for each  
16 individual transaction. So the first one was borrower 2 called  
17 in regarding the 3,629-dollar charge in the MAS, advised  
18 expense. And then if you go to the top of page 000931, it's  
19 "advances re the details advised transfer to loss mit."

20 THE COURT: Okay, go ahead.

21 Q. Okay. So to make sense of this, she was complaining or  
22 calling to question about a 3,600-dollar expense charge, and  
23 she was referred over to loss mitigation who was handling her  
24 HAMP application?

25 A. Yes, she was transferred to loss mitigation.

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1 Q. Okay. Then if we look about twelve down from the top on  
2 that 931, we'll see an entry that is dated October 6th, 2009.  
3 It's called a DM entry, and the transaction ID number is 31123,  
4 and it starts out with a number, and it's the same number.  
5 It's 3,629. And would you please tell us what that says?

6 A. I'm sorry, which line are you referring to?

7 Q. It's about twelve from the top, and it starts out with a  
8 number in the transaction message --

9 A. Okay.

10 Q. -- and that number is 3,629. It's the first --

11 A. That's a continuation of a comment to above.

12 Q. Okay. Would you please read the whole thing so we don't  
13 miss the sense of it?

14 A. Talked to borrower 2. Called in to check the amount for  
15 her account -- for her 3,629 dollars. Advised that this is the  
16 expense and advised that it is foreclosure advance on company-  
17 owned loan.

18 Q. Okay. Now, when it says "company owned loan", which  
19 company is that?

20 A. I don't know.

21 Q. But do you believe that that 3,629 dollars was what the  
22 company wanted Mrs. Mack to pay for the foreclosure that you  
23 had brought against her and dismissed?

24 A. I don't know.

25 Q. Okay. And to go on, she wanted to know some information

1 about her loan modification. Is that true?

2 A. Yes.

3 Q. And you advised her that you still need the proof of  
4 income. Is that correct?

5 A. Correct.

6 Q. And I'm curious about something I see down here. It's a  
7 continuation of the same message, and it says "Result CD  
8 changed from LMDC to LMDC." What does that mean?

9 A. I don't know.

10 Q. Okay. If you would look down about ten up from the  
11 bottom, there is an entry for October 20th, 2009. It bears a  
12 transaction type of LMT, and the transaction user ID is 20136.  
13 And then the messages starts out with about eight zeros  
14 following it with the word "task". Do you see that, sir?

15 A. Yes.

16 Q. Okay. What does that message mean?

17 A. I don't know.

18 Q. Okay. Does it mean that the HAMP application was  
19 rejected?

20 A. I don't know.

21 Q. Okay, if you'll turn over to 932, and about twelve lines  
22 from the top, the entry date is October 20th, 2009. It's a DM  
23 entry, user code is 20136. And it says -- it seems to say to  
24 me, but I'd like for you to tell us what it means: "Default  
25 reason 1 changed to excessive obligations." Do you see that,

1 sir?

2 A. Yes.

3 Q. Okay. What default are they talking about?

4 A. I don't know.

5 Q. If you will go down about fifteen lines from that, there  
6 is an entry on October 21st, 2009, and the transaction type is  
7 CIT. What is CIT, by the way? I think you told us.

8 A. Customer inquiry tracking.

9 Q. Okay. And the transaction user ID is 13413. And then the  
10 words -- looks to me like -- shortage amount \$15,907.37. Is  
11 that what it says?

12 A. Yes, it does.

13 Q. Pardon me?

14 A. Yes, it does.

15 Q. Okay. What shortage is that?

16 A. I don't know.

17 Q. Were the Macks current in their account, at that time?

18 A. I don't know.

19 Q. Okay. Would you please turn over to page 933? And look  
20 about twenty up from the bottom. This is an entry for November  
21 3rd, 2009. It's CIT, and the transaction user ID is 13304. Do  
22 you see that, sir? It starts out with the words, or the  
23 letters -- I'm sorry, the numbers 012?

24 A. Yes.

25 Q. Okay. What does that message say?

1 A. Closing CIT 710, HAMP modification denied as -- and then  
2 further down it says -- as loan does not meet pre-qualification  
3 criteria.

4 Q. Okay. Does that mean that the modification that Mr. and  
5 Mrs. Mack applied for were denied on that date?

6 A. Yes.

7 Q. And do you know if the Macks were notified that their  
8 modification was denied?

9 A. I don't.

10 Q. If you look down about eight up from the bottom, you'll  
11 see a note on November 4th, 2009. This is a transaction type  
12 NT, and the transaction user number is 13304. It looks to me  
13 it says "HAMP modification denied, mortgage is ineligible." Is  
14 that what it says?

15 A. Yes.

16 Q. Okay. And why was the mortgage ineligible?

17 A. I don't know.

18 Q. If you will look down about four lines below that, and you  
19 will see on November 4th, 2009, there is an OL entry, the  
20 transaction user ID is 28831. And it says "WDOYLM denial  
21 letter." Do you see that?

22 A. Yes, I do.

23 Q. Okay. Is that where the Macks were notified that their  
24 HAMP modification had been rejected, by that letter?

25 A. I don't know. That may have been the date the denial

1 letter was generated.

2 Q. Okay. And that was done on November 4th, 2009? Is that  
3 correct?

4 A. That's the date the comment was put in, yes.

5 Q. And if you would please look at page 934? About fifteen  
6 down from the top, there's an entry on November 6, 2006 (sic).  
7 It's a DM entry. The transaction user ID is 20305. Do you see  
8 that, sir?

9 A. Yes.

10 Q. Okay. I don't want to take this out of context, but would  
11 you tell us what that message says?

12 A. It says, "Outbound call, called borrower 1 and advised mod  
13 was denied."

14 Q. Go on.

15 A. To the next line under that transaction user?

16 Q. Yeah. That same transaction user.

17 THE COURT: It's not.

18 A. Further down, about five down with the same transaction  
19 code, it says, "He will need to increase income or sell  
20 property."

21 Q. So would your transaction user 20305 have told Mr. Mack  
22 that he's got one of two options, he's got to increase his  
23 income or he's got to sell his property?

24 A. I don't know.

25 Q. Okay. Would you look down about ten lines down below

1 that, the entry is November 6th, 2009. It's an NT transaction  
2 type, and the transaction user number is 11636. And the  
3 message starts out with "NDR". Do you see that, sir?

4 A. I -- yes, I see it now.

5 Q. Okay. I don't want to take it out of context, but would  
6 you please tell us what that message says?

7 (Pause)

8 A. There's multiple transactions for the same --

9 Q. Okay, let's focus on the ones with that user, 11636, the  
10 message from that --

11 A. Okay.

12 Q. -- entry.

13 A. Starting from the top, about ten down, it's an NT  
14 transaction 11636, starts with "B2".

15 Q. Okay.

16 A. It says "B2 called in, said she was previously denied for  
17 mod, wanted to" -- and then you go down a few lines to the next  
18 transaction for 11636 -- "wanted to know what else she could do  
19 that may help. Advised if" -- and then a few more lines down,  
20 about five or six -- "nothing has changed and she didn't want  
21 to do a refi."

22 Now a few more down, "Call transferred to collections to  
23 see if there was any options" -- then two down -- "available  
24 for her. She also mentioned that she was" -- two down --  
25 "never escrowed before, wanted to remove. Advised her that

1 in" -- two down -- "order to remove she will need to bring down  
2 escrow account to a zero balance. She said there is no way she  
3 can make that. Transferred to collections."

4 Q. Okay. If you will look four up from the bottom, there's  
5 an entry on November 12th, 2009. It's an NT entry, and the  
6 transaction user number is 12031. "B1 will call back to set up  
7 a SS." Do you see that, sir?

8 A. Yes.

9 Q. What is an SS?

10 A. Short sale.

11 Q. Okay. B1 was Mr. Mack, right?

12 A. I don't know.

13 Q. Okay. Do you know that his wife was in the hospital at  
14 that time?

15 A. I do not, no.

16 Q. And this message has a name on it. It looks like R.  
17 Nerrimour (ph.). Do you see that, sir?

18 A. Yes, I do.

19 Q. Is that an employee that worked for you at the Fort  
20 Washington foreclosure facility?

21 A. Not in my department, no.

22 Q. Do you know where that employee worked?

23 A. No, I don't.

24 Q. Why did they have a user number of 2616 opposite the name?

25 A. I don't know.

1 Q. We haven't seen many names opposite these messages, have  
2 we?

3 A. No.

4 Q. Okay. If you'll turn to the next page and please look  
5 three down from the top. There's a message from November 12th,  
6 DM, the transaction user number is 12031. Do you see that,  
7 sir?

8 A. Yes, I do.

9 Q. And would you please tell us what that message is?

10 A. If I could, the message actually starts on the prior page.

11 Q. Okay.

12 A. The second from the bottom.

13 Q. Yes.

14 A. "Talked to borrower 1, advised of mod denial and reviewed  
15 for short sale. Borrower 1" -- then if you continue to the  
16 next page at the top -- "stated that his realtor suggested  
17 doing a short sale but" -- two down -- "borrower 1 wanted to  
18 know why his payment went to 12,000 dollars a" -- two down --  
19 "month. I advised him to call collections and call me back if  
20 he decides to do a short sale. R. Nerrimour, 2616."

21 Q. Okay. And that's this R. Nerrimour that is signing that  
22 again, correct?

23 A. Yes.

24 Q. Okay. Okay, and if you will look about five lines down  
25 from that, an entry on November 27th, 2009, CIT, the user

1 number is 17085. Do you see that, sir?

2 A. Yes, I do.

3 Q. And it says "014 counseled to sell, worked twenty-plus  
4 days, no contact." Do you know what that means?

5 A. No, I do not.

6 Q. Okay. Please turn over on the next page, which would be  
7 Deutsche Bank 936, five down from the top. There's an entry at  
8 December 23rd, 2009, NT, and the transaction user number is  
9 25041. Do you see that, sir?

10 A. Yes, I do.

11 Q. It says, "PO unpaid fees, 3,722 dollars." Do you know  
12 what that is?

13 A. No, I don't.

14 Q. And beneath that, it says "PO escrow balance,  
15 \$28,028.21 -- or \$98, I guess, and 21 cents. Do you see that  
16 sir?

17 A. Yes. Yes, I do.

18 Q. Okay. Okay. If you'll look down fourth from the bottom,  
19 you'll see an entry from January 6th, 2010. Transaction type  
20 is NT. The transaction user number is 13567. Do you see that?

21 A. Yes, I do.

22 Q. Can you put that together? That's obviously a couple of  
23 lines that go together for that.

24 (Pause)

25 Q. If you could just read that line, then. I want to make

1 sure we have it right.

2 A. So it starts with NT and then 13567. It starts with "B2".

3 Q. Okay.

4 A. "B2 called in inquiring call received GMAC could not  
5 understand" -- and about five entries down -- "process of  
6 making settlement. Needs to know full" -- and if you go down a  
7 few more, about five more -- "payoff calculated for 1/31,  
8 1,025,000 amount. Customer inquired why so high. Advised  
9 negative escrow balance needs to be" -- next page at the top --  
10 "repaid. Customer upset. Pays quarterly, cannot pay" -- down  
11 about five more -- "additional funds. Transferred to tax.  
12 Discussed disbursement."

13 Q. Okay. So would you look down to just past the middle of  
14 the page, there's an entry on 1/14/2010. It's the CIT  
15 transaction type, user transaction number is 11283, and it  
16 begins with the numbers 018. Do you see that, sir?

17 A. Yes, I do.

18 Q. Okay. Would you please read that to us?

19 (Pause)

20 A. That line says "018 continued. Closing CIT 127, total  
21 billed 3712.".

22 Q. Okay. Well, keep going till you get to the part where it  
23 starts out "018 closing".

24 A. Oh, further below? "018 closing CIT 127, mailed letter  
25 advising there is a balance of liquidation preservation fees on

1 our account in the amount of 3,712 dollars. Fees were assessed  
2 to your account due to foreclosure, EPO 883 dollars, 11/4/09  
3 filing fee, 1,945, 9/10/9 foreclosure fee 1,170 9/1/09, process  
4 service 180 dollars, 9/10/9 recording fees of 9 dollars; 9/1 of  
5 '09 title costs of 150 dollars; 9/1 of '09 title search 175  
6 dollars."

7 Q. Okay. Now where it said "foreclosure fee 1,170 dollars",  
8 was that the amount that GMACM paid David Stern to file this  
9 foreclosure?

10 A. Yes.

11 Q. Okay. And you were demanding that the Macks pay you back  
12 for that?

13 A. That it was -- in the context of this response, that's  
14 what the funds represented or what the expense represented, in  
15 the system.

16 Q. Okay. So you were demanded that you be paid back for what  
17 you had to pay David Stern for filing this foreclosure,  
18 correct?

19 A. It -- I don't know about demanded, but it was included in  
20 the payoff statement --

21 Q. Okay.

22 A. -- that was issued.

23 Q. And that payoff statement was what was required to pay off  
24 the loan so -- because the Macks had a contract for sale of the  
25 property -- you weren't going to release your mortgage until

1 you got paid back your attorneys' fees, were you?

2 A. I don't know. I --

3 Q. Okay. Third line from the bottom, it's at January 15th,  
4 2010, NT, the number is -- user number is 25041. Do you see  
5 that, sir?

6 A. Yes, I do.

7 Q. You were demanding an escrow balance to be paid at  
8 \$23,923.36, correct?

9 A. Correct.

10 THE COURT: Do you know whether there were any unpaid  
11 property taxes on the property in January 2010?

12 THE WITNESS: Well, as I recall correctly in the  
13 history -- I'd have to look to find it, but I think there were  
14 delinquent taxes that needed to be paid, and GMAC paid those  
15 taxes and was recovering those through monthly payments and  
16 through the final statement. But they -- if I recall  
17 correctly, if it was -- it did represent delinquent property  
18 taxes.

19 THE COURT: Could you show me where the delinquent  
20 taxes are?

21 THE WITNESS: If I can just get a minute.

22 MR. GARBER: Your Honor, later on, I have a breakdown  
23 of what GMAC says the charges are.

24 THE COURT: No, I remember seeing the charges, but I  
25 thought I also remembered a note that either borrower one or

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1 borrower two said they were paying their taxes quarterly. I  
2 looked and I didn't remember seeing anything about delinquent  
3 taxes.

4 THE WITNESS: But there was a reference to taxes being  
5 delinquent for 36,000 or -- I remember -- just bear with me;  
6 I'm sorry.

7 (Pause)

8 THE WITNESS: I believe it is the -- I'm on page  
9 000933.

10 THE COURT: Yes.

11 THE WITNESS: I think what I was referencing was the  
12 escrow analysis advised 36,000 to pay -- advised borrower that  
13 the amount of insurance and taxes will be spread across the  
14 loan, and payment at this time is not determined, advise 36K is  
15 not --

16 THE COURT: Well, where does say that there's a  
17 default. What I had read the notes as saying, in prior  
18 testimony yesterday, that when a loan is considered for a loan  
19 modification, that GMAC's guidelines require putting the  
20 borrower on tax and insurance escrow, and that's why it was set  
21 up. I don't remember hearing anything about any default, nor  
22 does this entry that you're pointing to say there was a  
23 default. It's just that the taxes would be -- taxes and  
24 insurance would be escrowed and would be spread across twelve  
25 months. Can you show me where it says there's a default?

1 THE WITNESS: No, that was just a misunderstanding on  
2 my part, looking back at the --

3 THE COURT: You're not finding anything that shows  
4 there was a default, correct?

5 THE WITNESS: No, I just misunderstood that.

6 THE COURT: Was my understanding correct?

7 THE WITNESS: Yes, it was.

8 THE COURT: Go ahead.

9 BY MR. GARBER:

10 Q. Mr. Cunningham, would you be so kind now to turn to the  
11 book you have in front of you? It's called "Creditor Burnett's  
12 hearing notebook", volume number 1. Do you have that, sir?

13 A. Yes, I do.

14 Q. Okay. Please look at item number 3. That's the GMAC  
15 Mortgage welcome letter of October 24th, 2006. Do you recall  
16 testifying to that a little earlier in the day?

17 A. Yes, I do.

18 Q. Okay. Now, I would ask you now, if you would be so kind,  
19 to turn to the place in the purged loan notes where you find  
20 that that letter was sent.

21 A. Can you ask the question again?

22 Q. Would you please tell us where in the purged loan notes do  
23 you see an entry showing that that letter was sent?

24 A. I see in the system that -- the date the letter was  
25 generated.

1 Q. Where do you see that?

2 A. That would be on the 10/25 date, just acknowledging  
3 that -- that the letter was --

4 Q. Are you talking about Deutsche Bank 916? Is that --  
5 bottom right-hand corner, that's the page you're looking at,  
6 first page?

7 A. Yes.

8 Q. Okay. And you're looking at the second entry on that  
9 page?

10 A. Yes.

11 Q. Where it says "Welcome letter eligible"?

12 A. Yes.

13 Q. It doesn't say letter was generated, does it?

14 A. No, it doesn't.

15 Q. It doesn't say a letter was sent anywhere around there,  
16 did it?

17 A. No, it doesn't.

18 Q. Okay. Let's go to the next one, which is the letter from  
19 GMAC to the Macks, dated July 23rd, 2009. That's number 7 on  
20 our trial log book.

21 THE COURT: Plaintiff's Exhibit 37?

22 MR. GARBER: Pardon me, sir?

23 THE COURT: Plaintiff's Exhibit 37?

24 MR. GARBER: Yes, it may be; let me look at it. Yes,  
25 you are correct, Your Honor, Exhibit number 37.

1 Q. Would you please look at that, sir?

2 A. Okay.

3 Q. And can you tell us, does that appear in the purged loan  
4 notes?

5 A. There's a comment on 723 that a loss mitigation package  
6 was sent.

7 Q. Okay. So it's 723 --

8 A. MP01050, about seven lines down.

9 Q. Okay. And you think that package contained that letter?

10 A. The second paragraph of the document, that letter, says  
11 "enclosed is our financial analysis form".

12 Q. Okay. And let's go to the next letter. And the next one  
13 that I have is found in our tab 8, and let me get that exhibit  
14 number.

15 THE COURT: Exhibit 38?

16 MR. GARBER: Exhibit 28, yes, Your Honor.

17 A. Okay.

18 Q. And can you find that letter in these purged loan notes?

19 A. There's a note on 8/27 that references a ten-day doc  
20 requesting proof of income.

21 Q. Okay. So you take this letter was the letter requesting  
22 proof of income?

23 A. Yes.

24 Q. Now, let's take a minute and look at this letter. It has  
25 the notice at the bottom of it; can you see that notice?

1 A. Notice? I'm sorry.

2 Q. Do you see a notice at the bottom of the body --

3 A. Oh, yes, I do.

4 Q. -- of the letter?

5 A. Yes, I do.

6 Q. This is an attempt to collect the debt. Do you see that,  
7 sir?

8 A. Yes, I do.

9 Q. Okay. And that letter, was it generated from the Dallas  
10 office?

11 A. Yes, it was.

12 Q. Okay. And I think you told us earlier the Dallas office  
13 was an office that handled collections, right?

14 A. They did handle collections and loss mitigation.

15 Q. They handled loss mitigation as well, okay. If you would  
16 please turn back to tab number 7, which is Plaintiff's Exhibit  
17 37, and look at that.

18 A. I'm sorry, which one?

19 Q. It's tab 7 in our notebook, at Plaintiff's Exhibit 37.

20 A. Okay.

21 Q. And if you would look at who signed that; can you tell us  
22 who signed that?

23 A. Is this Plaintiff's Exhibit 37?

24 Q. It's tab 7, but it's Plaintiff's Exhibit 37. So look  
25 under tab 7 of the notebook.

1 A. Okay. I don't see a signature.

2 Q. Okay. You see, though, an entry there saying who sent it,  
3 don't you, typed entry?

4 A. It refers to customer care.

5 Q. At loan servicing, right?

6 A. Yes, it does.

7 Q. And if you look at the top, the address that it gives is  
8 the GMAC Mortgage address at 3451 Hammond Avenue, which is  
9 where customer care is, right?

10 A. Yes.

11 Q. And there's no notice to the Macks that they're attempting  
12 to collect the debt on this letter, is there?

13 A. I --

14 THE COURT: There's nothing there. Let's go on with  
15 your questions. Come on.

16 MR. GARBER: Okay.

17 Q. This is for loss mitigation; it came out of Waterloo,  
18 Iowa, right?

19 A. Yes.

20 Q. And the next one is out of Dallas, Texas, and that's  
21 Waterloo, Iowa. The next one that I had --

22 THE COURT: That didn't make sense what you just said.

23 MR. GARBER: What did I say?

24 THE COURT: Ask your question again.

25 Q. Oh, okay. The one on tab 7 was customer care from loss

1 mitigation, and it came out of Waterloo --

2 THE COURT: Customer care for loan servicing.

3 MR. GARBER: Pardon?

4 THE COURT: It says "Customer care loan servicing".

5 MR. GARBER: Yes, out of Waterloo, Iowa.

6 THE COURT: That's not what you said.

7 MR. GARBER: Customer care loan servicing.

8 THE COURT: You said loss mitigation.

9 MR. GARBER: Oh, yes.

10 Q. But it was about loan mitigation, right, that letter?

11 A. It's from loan servicing customer care.

12 Q. But they were writing about loan mitigation? They were  
13 helping the Macks with their loan mitigation?

14 A. They were providing the Macks a financial analysis form  
15 for the purposes of loss mitigation.

16 Q. Right, okay. Okay. And the next letter, which was  
17 Plaintiff's 38, found at tab 8, that came from Dallas, Texas,  
18 and that had the notice that they're collecting a debt.

19 Let's go to the next one, which is tab number 9. Can you  
20 see that, sir? And it's Plaintiff's Exhibit number 16 that I'm  
21 referring to.

22 A. Okay.

23 Q. And this is a letter from the Macks to General Motors  
24 asking -- GMACM asking for help?

25 A. Yes.

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1 Q. And the date by their signatures is August 10th, 2009.

2 Can I ask you if you can find that in the purged loan notes?

3 A. On 8/11, about seven entries -- about the -- the  
4 transaction type is CIT; trans user is 15732, "new CIT 835 fax  
5 received hardship lawyer".

6 Q. Okay. I'm sorry. I didn't see that. How far up from the  
7 bottom is that? About ten up? Yes, I do see it. 006, "new  
8 CIT"; that's the one you're referring to?

9 A. Yes.

10 Q. Okay. And that's the letter that you think this applies  
11 to. Okay. If you would be so kind as to turn to our tab 10 on  
12 the notebook, and look at Plaintiff's Exhibit number 39. That  
13 is a letter dated September 30th, 2009, from GM Mortgage to the  
14 Macks. Do you see that, sir?

15 A. Yes, I do.

16 Q. And it came from Dallas, Texas, right?

17 A. Yes.

18 Q. And it carried the warning that it was an attempt to  
19 collect the debt, correct?

20 A. Yes, it did.

21 Q. And can you tell us, are you able to find that on the  
22 purged loan notes, this letter?

23 A. On September -- I'm on page 000930 --

24 Q. Yes.

25 A. -- the comment, September 29th, 2009, "NT transaction,

1 user ID 25101WD" -- 0Y -- or "OYLM, ten-day doc requesting  
2 proof of income".

3 Q. And you think that letter applies to that entry?

4 A. Yes.

5 Q. Okay. Would you please turn to tab number 11, Plaintiff's  
6 Exhibit number 34, bearing date of October 7th, 2009, "Macks  
7 are writing GMAC Mortgage"; do you see that, sir?

8 A. Yes, I do.

9 Q. Okay. And they are writing to GMAC Mortgage in Dallas,  
10 Texas because Dallas, Texas has been writing them, correct?

11 A. Yes.

12 Q. And can you find this letter on the purged loan notes?

13 A. There's a comment on October 15th of 2009 at CIT, from  
14 transaction user 13682, starting with 008, new CIT 601, which  
15 indicates fax received for Social Security benefit.

16 Q. Do you think that represents the receipt of this letter on  
17 the 15th of October?

18 A. I don't know.

19 Q. Okay. Now, this letter, which is Plaintiff's Exhibit  
20 number 34, there's a Deutsche Bank stamp of 00074. Do you see  
21 that, sir?

22 A. Yes, I do.

23 Q. Okay. That would indicate to you that this document  
24 actually came from Deutsche, correct?

25 A. I'm sorry; can you ask the question again?

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1 Q. This document was produced by Deutsche Bank, right?

2 A. I don't know.

3 Q. Did GM -- GMACM gives this to Deutsche Bank to produce?

4 A. Not that I'm aware of; I don't know.

5 Q. Okay. If you would be so kind as to turn to tab number  
6 12, and it contains Plaintiff's Exhibit number 43.

7 A. Okay.

8 Q. This is the letter from the Macks to GMAC Mortgage at  
9 customer care, Waterloo, Iowa, correct?

10 MR. LEWIS: Mr. Garber, I'm sorry; you said this is  
11 Plaintiff's 43?

12 THE COURT: Yes, this is the one that hadn't been --  
13 didn't have a number on it --

14 MR. LEWIS: Oh, okay.

15 THE COURT: -- and it's behind tab 12.

16 MR. LEWIS: Thank you, yes.

17 Q. Plaintiff's Exhibit number 43, do you see that, sir?

18 A. No. It's in category 12?

19 THE COURT: It's behind tab 12.

20 THE WITNESS: Behind tab 12.

21 A. It has "Staples" at the top? I just want to make sure I'm  
22 looking at the right. Does it say "Staples" at the very top?

23 Q. Yes, it does.

24 A. Okay. Yes -- yes, I have it.

25 Q. Okay. Now, you looked in the purged loan notes; you

1 didn't see that, correct?

2 A. No, I didn't.

3 Q. Okay. The next one is tab number 13, which contains  
4 Plaintiff's Exhibit number 14, and would you please turn to  
5 that?

6 MR. LEWIS: I think it's Plaintiff's Exhibit 40, not  
7 14.

8 Q. Plaintiff's Exhibit 40, yes, tab 13.

9 A. Okay.

10 Q. Okay. Can you find this one having been sent out on the  
11 purged loan notes?

12 A. There's a reference on -- at the bottom of page 933, with  
13 a transaction type OL, from 28831WDOYLN, denial letter.

14 Q. Okay. So you think that was sent out -- that is, this  
15 entry represents this letter?

16 A. Yes.

17 Q. Okay. And please turn to tab number 14, Exhibit number  
18 41 -- Plaintiff's Exhibit number 41.

19 A. Okay.

20 Q. Do you find that in here?

21 A. There -- on 12/15/2009, there's a transaction OL2202 --  
22 22062 for WDOYNOD, "waive escrow negative bal".

23 Q. Okay. I'm not following that.

24 A. It's --

25 Q. Oh, down under OL by 22062?

1 A. Correct.

2 Q. And what does that say?

3 A. "Waive escrow negative bal".

4 Q. And you think that represents a letter?

5 A. Yes.

6 Q. Why do you think that?

7 A. The -- the context of the letter in conjunction with the  
8 comment, and the OL code stands for on-line letter.

9 Q. Um-hum. So --

10 A. So it was a system-generated letter.

11 Q. On-line letters?

12 A. Which means it's from -- it's coming from a LoanServ  
13 system.

14 Q. Coming --

15 A. It's generated from the LoanServ system, our system.

16 Q. Okay. Now, if you would be so kind as to turn to tab  
17 number 2, please.

18 A. Volume 2? I'm sorry.

19 Q. Tab number 2; that's Plaintiff's Exhibit number 29. Do  
20 you have that, sir?

21 A. Yes, I do.

22 Q. Turn to the second page.

23 A. Okay.

24 Q. And it says this is milestone for 1001464-0609002738-6 at  
25 the top; do you see that, sir?

1 A. Yes, I do.

2 Q. Is that the Macks' account?

3 A. I don't know.

4 Q. Okay. Please look from the bottom up, because it goes in  
5 chronological order from the bottom up, to the left-hand side;  
6 you'll see the first note, "Transfer of dental (sic) and  
7 official rights" on October 29, 2006. Do you see that, sir?

8 A. On what date? I'm sorry.

9 Q. On October 29th, 2006.

10 A. Yes, I do.

11 Q. And if you look to the right you'll see the new investor  
12 is 1000375 GMAC Mortgage, do you see that, sir?

13 A. Yes.

14 Q. Okay. And then if you will now go up to the third entry  
15 from the top, and it says, starting from the left-hand side,  
16 "Transfer of 2/9/2007", you see that, sir?

17 A. Yes.

18 Q. And now it says the new investor is 1000440 Residential  
19 Funding Company. Do you see that, sir?

20 A. Yes.

21 Q. And the old investor is the one that --

22 THE COURT: Where does it say "investor"?

23 MR. GARBER: Pardon?

24 THE COURT: Where does it say "investor"?

25 MR. GARBER: "New investor and old investor", in the

1 comments on the right.

2 THE COURT: Okay.

3 Q. Okay. And the "old investor" was 1000375 GMAC Mortgage,  
4 correct, sir?

5 A. Correct.

6 Q. Okay. And then if we look up to the second from the top,  
7 which is described on the left as a transfer of beneficial  
8 rights, on October 5th, 2007, do you see that, sir?

9 A. Yes, I do.

10 Q. And now the old investor is 1000440 Residential Funding,  
11 which we just saw, and the new one is 100054 RC Trustee number  
12 2. Do you see that, sir?

13 A. Yes, I do.

14 Q. And is that a name for Deutsche Bank and the RALI trust  
15 that is the possessor of the loan that is the subject of these  
16 proceedings?

17 A. I don't know.

18 Q. You will agree with me, will you not, that it did not  
19 go -- according to this document, this milestones document, it  
20 did not go into the hands of the RFC trustee 02 until March  
21 5th, 2007?

22 A. Yes.

23 Q. Okay. Before I follow up on that, I want to do another  
24 item. We have a document that has been submitted as  
25 Plaintiff's Exhibit number 7, and I don't have a copy for you,

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1 but I've supplied it to the Court, supplied it to opposing  
2 counsel.

3 THE COURT: I didn't see it.

4 MR. GARBER: Plaintiff's Exhibit number 7? It's the  
5 complaint. Actually, it may be here, but we can look at it in  
6 the white notebook. I believe that it is under tab B -- no,  
7 tab A. Okay, let's use this one.

8 THE COURT: This is the trust's Exhibit A?

9 MR. GARBER: In the Trust Exhibit A, yes. Trust  
10 Exhibit A, and I don't know what -- is that your Exhibit A  
11 also?

12 THE COURT: It's DX-A.

13 UNIDENTIFIED SPEAKER: It looks like it was your  
14 Exhibit 7.

15 MR. GARBER: Yes, it's my Exhibit 7.

16 Q. Do you have the white notebook in front of you, sir?

17 A. I do, yes.

18 Q. Okay. And would you please tell us what you think this  
19 is?

20 A. It says "Complaint foreclosed mortgage".

21 Q. Okay. And if you would, would you please read paragraph  
22 number 4?

23 A. The mortgage was -- excuse me. "The mortgage was recorded  
24 on October 17th, 2006, on official record books 4123, at page  
25 804 of the public record of Collier County, Florida, and

1 mortgage of the property described in it, then owned by and  
2 possessed by the mortgagors. A copy of the mortgage and note  
3 are attached hereto as an Exhibit A. Said mortgage was  
4 subsequently assigned to Deutsche Bank Trust Company Americas  
5 as trustee for RALI 2007QS3 by virtue of an assignment to be  
6 recorded".

7 Q. Okay. Now, would you please look back at the attachment,  
8 which is Exhibit A? Do you see that, sir?

9 THE COURT: I don't. Where is it?

10 MR. GARBER: It's behind the mortgage foreclosure  
11 complaint, about the third page down.

12 THE COURT: In the lower right corner, what page  
13 number?

14 MR. GARBER: Yeah, and somebody has hand --

15 THE COURT: In the lower right corner, what page  
16 number?

17 MR. GARBER: Oh, Exhibit A, page 3, is what says here.

18 THE COURT: Okay. I got it.

19 Q. And somebody has handwritten in "Exhibit A" and put some  
20 quotation marks. Do you see that, sir?

21 A. Yes.

22 Q. Okay. And you will agree with me that that, and the  
23 subsequent twenty-three pages, are the mortgage, the Macks'  
24 mortgage that is at issue here today, correct?

25 A. Yes.

1 Q. Okay.

2 MR. LEWIS: Your Honor, I'm having trouble following  
3 the relevance here. This seems way out of bounds.

4 MR. GARBER: Your Honor, I --

5 THE COURT: I don't understand the relevance either,  
6 but I'm going to let him go on. Go ahead, let's get through  
7 this. Come on.

8 MR. GARBER: Okay.

9 Q. After the mortgage, sir, do you see another document, and  
10 it's mentioned as Exhibit A, page 23?

11 A. Yes, I do.

12 Q. Okay. What is that?

13 A. I don't know.

14 Q. Is this a document that was generated by your office?

15 A. I don't know.

16 Q. Do you see attached to that mortgage, in any place, a copy  
17 of the note that is referred to in the paragraph that I asked  
18 you to read, or said in Exhibit A there is a note attached?

19 THE COURT: What's the relevance of this, Mr. Garber?  
20 I'm running out of patience.

21 MR. GARBER: Your Honor, the relevance is this. I  
22 think the Court may have two questions in its mind from all of  
23 this. Number one: why did this start? And why did it end?

24 THE COURT: It started because they made a really  
25 serious mistake. And why it ended, I don't know.

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1 MR. GARBER: And these answers will say why it ended,  
2 I think. They say it was a mistake; I think these answers may  
3 show otherwise.

4 THE COURT: Well, let's go --

5 MR. GARBER: Okay.

6 THE COURT: -- because you're not getting to the  
7 point.

8 Q. Okay. So there is no note contained with this suit, is  
9 there?

10 A. Not in the documents here, no.

11 Q. Okay. Now, I would like to refer you to documents that  
12 have been previously given to me. Let me give a copy to you.

13 MR. GARBER: Your Honor, I had copies made over lunch  
14 hour, and --

15 THE COURT: Why wasn't it pre-marked?

16 MR. GARBER: Because --

17 THE COURT: Is this an impeachment document?

18 MR. GARBER: Yes, they're impeachment documents, and I  
19 envision --

20 THE COURT: Let me see what this is. Bring it up.

21 I'm losing my patience, Mr. Garber. I require that all  
22 exhibits be pre-marked. You've got a whole series of new  
23 exhibits?

24 MR. GARBER: There are four notes, four versions.

25 THE COURT: Why weren't they marked --

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1 MR. GARBER: I --

2 THE COURT: The promissory notes are hardly a mystery  
3 or a surprise. You have not pre-marked these. Why should I  
4 permit you to use them? Why should I permit you to mark them  
5 now? I required that all exhibits be pre-marked and exchanged  
6 ahead.

7 MR. GARBER: I didn't envision them to be exhibits; I  
8 envisioned them to be documents to use for cross-examination.

9 THE COURT: Well, do you think you don't have to mark  
10 documents that you wish to use for cross-examination?

11 MR. GARBER: I didn't think that I did.

12 THE COURT: Well, you do. What's the point? Tell  
13 me -- make an offer of proof.

14 MR. GARBER: Okay.

15 THE COURT: Go back to the microphone. Take your  
16 documents with you.

17 MR. GARBER: Here is what I intend to demonstrate,  
18 Your Honor, that in fact when the mortgage was sent out to Mr.  
19 Stern for foreclosure, that it did not contain the name of the  
20 proper party to bring this suit in, which was Deutsche Bank;  
21 that was the one they wanted to. The copy of the mortgage was  
22 sent and a copy of the note was sent. Mr. Stern apparently  
23 made some effort to prepare a document, to sue somebody by  
24 somebody, and that was not satisfactory; he had to make a  
25 correction on that. Eventually, he had to sue Deutsche Bank

1 because GM wanted him to sue -- I'm sorry -- sue in the name of  
2 Deutsche Bank. He sued in the name of Deutsche Bank, but he  
3 did not have a note that showed that Deutsche Bank had  
4 possession of that property. And therefore, a correction had  
5 to be made and the notes had to be endorsed to reflect that.  
6 However, GM could not, at that point, legally endorse those  
7 notes to reflect that. And the reason they couldn't do it was  
8 because in 2007 they put this loan into a pass-through account.

9 THE COURT: When did you get copies of the notes?

10 MR. GARBER: I've had them for two years, Your Honor.

11 THE COURT: Okay. You didn't mark them. They haven't  
12 been pre-marked. These are not impeachment documents. They  
13 don't relate to the RESPA claim. I am barring you from using  
14 those exhibits.

15 MR. GARBER: Okay.

16 THE COURT: You've been on notice for months about my  
17 trial procedures. You haven't followed them. You are  
18 precluded from marking those exhibits now. Move on with your  
19 questions and let's get over with this.

20 MR. GARBER: Okay. Your Honor, may I take a minute to  
21 briefly review? I think I'm about at the end.

22 THE COURT: Yes. Tell me how those notes bear on your  
23 RESPA claim, which relates only to the October 26th, 2009  
24 letter, if it's a QWR? How do those notes bear on the RESPA  
25 claim?

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1 MR. GARBER: Well, because GM is using the purged loan  
2 notes for evidence that they did not receive the letter from my  
3 client, and they're saying they can be trusted, they're  
4 accurate and so forth. It doesn't have an entry there. We've  
5 seen several letters, or at least one letter that is not  
6 mentioned on there. We've seen --

7 THE COURT: So far the only -- this witness has  
8 identified -- every letter you've shown him, he has indicated  
9 where he believes it is recorded in the purged loan notes.  
10 Tell me how those promissory notes, which you did not mark, how  
11 those bear on your RESPA claim.

12 MR. GARBER: I think they would show that in fact  
13 these purged loan notes had been doctored, they are not a true  
14 account, and GM cannot have it come out that they did not have  
15 this loan in this trust.

16 THE COURT: Okay. I reject that argument. You're  
17 prevented from marking those exhibits. Let's finish up.

18 MR. GARBER: Okay. May I have a few minutes to look  
19 over?

20 THE COURT: Yes.

21 MR. GARBER: Your Honor, I have no further questions.

22 THE COURT: Okay. Mr. Lewis, redirect.

23 MR. LEWIS: I have just a very few questions, Your  
24 Honor.

25 REDIRECT EXAMINATION

1 BY MR. LEWIS:

2 Q. First of all, Mr. Cunningham, looking at the loan notes,  
3 can you tell why the escrow was set up in the first place?

4 A. It appeared to be because of the request for a  
5 modification.

6 Q. And why would an escrow be set up in the case of a request  
7 for a modification?

8 A. To prevent future delinquency on taxes and insurance.

9 Q. Okay. So that's a standard procedure?

10 A. Yes.

11 Q. Okay. And would that escrow require the payment of  
12 anything in addition to taxes and insurance that are projected?

13 A. No.

14 Q. So the only difference it would make would be a party  
15 who's going to have to fund the escrow might have to make  
16 payments more frequently, but the total, in any particular  
17 year, would be the same?

18 A. Correct.

19 Q. So they'd be paying the same amount of taxes, only through  
20 GMAC, and the same amount of insurance, only through GMAC,  
21 rather than directly, and maybe on a different schedule?

22 A. That's correct.

23 Q. Okay. Now, if you would open to Exhibit G in our exhibit  
24 book. These are the purged loan notes.

25 A. Okay.

1 Q. And if you would look at Exhibit G, page 11.

2 A. Okay.

3 Q. And do you see the entry towards the bottom "default  
4 reason 2" changed --

5 A. Yes.

6 Q. -- to "excessive obligations"? Do you see that entry?

7 A. Yes, I do.

8 Q. And you recall being examined about that earlier today,  
9 yes?

10 A. Yes, I do.

11 Q. Now, this default label, is it used only when a loan is in  
12 default?

13 A. No, it's used for purposes of loss mitigation activity.

14 Q. And why is that?

15 A. There's a particular screen, within the LoanServ  
16 application, that's used for loan modifications and other type  
17 of loss mitigation activity, and you know, primarily, those are  
18 done when loans are delinquent. So this system didn't  
19 differentiate between the loan being contractually current for  
20 purposes of this comment.

21 Q. Thank you.

22 MR. LEWIS: No questions, Your Honor.

23 THE COURT: Any further questions?

24 MR. GARBER: No further questions, Your Honor.

25 THE COURT: All right. Do you have any other

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1 witnesses, Mr. Lewis?

2 MR. LEWIS: I have none, Your Honor. I --

3 THE COURT: Does the trust -- go ahead.

4 MR. LEWIS: I will get you a full set of the purged  
5 loan notes, unless there's privileged information.

6 THE COURT: All right. Do you rest?

7 MR. LEWIS: I do.

8 THE COURT: All right. You're excused.

9 THE WITNESS: Thank you.

10 THE COURT: All right. I want to get this record  
11 closed, so I want you each to go through and make your offer --  
12 offer into evidence whatever exhibits I reserved -- I told you  
13 yesterday I was going to reserve until the end. I just --  
14 there -- you used a fraction of what's in notebooks, and I want  
15 to know today what the record consists of. So do you want to  
16 take a few minutes to collect your thoughts about that?

17 MR. GARBER: Yes, Your Honor.

18 THE COURT: Okay. So --

19 MR. LEWIS: Yes, Your Honor, although we did begin  
20 that process today on the theory --

21 THE COURT: Okay.

22 MR. LEWIS: -- that you might reach this point.

23 THE COURT: All right. How much time -- I'm not  
24 pressing you; how much time do you think you want to do that?  
25 I'll take a break now and let you do that.

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1 MR. LEWIS: I would think fifteen minutes.

2 MR. LEWIS: I think twenty minutes, Your Honor.

3 THE COURT: Let's -- let me ask a couple of questions  
4 as well. Yesterday you both raised the issue about post-trial  
5 memoranda. Is that your both -- is that what you want, or -- I  
6 mean, we haven't had a lot of evidence. I mean, I think I have  
7 the evidence pretty much in mind, but --

8 MR. LEWIS: We have a lot of evidence, if you combine  
9 what you've heard today with what's in the stipulated facts.  
10 And so I would like to have a chance to admit that together.  
11 Obviously, the Court's decision, whether you want us to do  
12 that.

13 THE COURT: Mr. Garber, what's your view?

14 MR. GARBER: I could go either way, Your Honor. I'm  
15 happy to do it today, or I could it later.

16 THE COURT: So are you ordering a transcript? What  
17 are you --

18 MR. LEWIS: We would order transcripts. I'll order a  
19 transcript anyhow, no matter what.

20 THE COURT: How much time -- if I permit you both to  
21 file post-trial memoranda, how much time do you want to be able  
22 to do that?

23 MR. LEWIS: On receipt of the transcript, I would need  
24 thirty days, or such less time as the Court would give us.

25 THE COURT: Well, I'm just --

1 MR. LEWIS: Your Honor, I've been working on this case  
2 a long time.

3 THE COURT: I know you have. I know you have.

4 MR. LEWIS: And I know the Court's been sitting on it  
5 a long time. We've both put a lot of effort into this,  
6 although it's been a friendly piece of litigation.

7 THE COURT: Right.

8 MR. LEWIS: I want to put my best foot forward at the  
9 end. May I suggest, Your Honor, if you think about this a  
10 little bit while we're in recess, and you can tell us what you  
11 want to do?

12 THE COURT: Okay. All right. So figure out what  
13 exhibits; I want to get that part -- I want the record  
14 closed --

15 MR. LEWIS: Very well.

16 THE COURT: -- as to what's in evidence.

17 MR. LEWIS: Thank you, Your Honor.

18 THE COURT: -- and what's not. Okay. Unless you  
19 knock on my door, I'll be back at 3:30, okay? And if you wish  
20 to -- I know your client is from South Jersey, am I right about  
21 that?

22 MR. LEWIS: Yes, sir.

23 THE COURT: So I leave it up to you and Mr. Garber --  
24 traffic gets bad, and if you want to leave, I'm not going to be  
25 offended if you don't stay, okay? But I leave that to you and

1 Mr. Garber to work out, okay? Don't think you're going to be  
2 insulting the Court in any way if you decided that you want to  
3 try and get a head start on traffic that only gets worse as the  
4 time goes by. Okay? I'm going to leave that to you all to  
5 decide, okay?

6 MR. GARBER: Thank you.

7 MR. MACK: Thank you.

8 (Recess from 3:11 p.m. until 3:36 p.m.)

9 THE COURT: Okay. Please be seated.

10 All right. Mr. Garber, why don't you tell me which  
11 exhibits you're going to move into evidence?

12 MR. GARBER: Yes, Your Honor. I would like to move  
13 into evidence -- can I do it out of order, because I had it by  
14 my notebook?

15 THE COURT: Sure.

16 MR. GARBER: Okay. In volume 1, I want Exhibit 17 --

17 THE COURT: And when you say exhibit, are we  
18 looking -- or I guess we are. Tell me what tab.

19 MR. GARBER: Okay.

20 THE COURT: Can you do that as well?

21 MR. GARBER: Tab 1.

22 THE COURT: Okay.

23 MR. GARBER: Tab 2.

24 THE COURT: Hang on.

25 MS. HIENSCH: Could you also say the exhibit number?

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1 THE COURT: Yeah.

2 MR. GARBER: Okay, yes.

3 THE COURT: So first give the exhibit number and then  
4 the tab, and I think we'll -- if you don't mind, okay?

5 MR. GARBER: Yes, Your Honor. It's Exhibit 17 at tab  
6 1; Exhibit 29 at tab 2; Exhibit 14 at tab 3; Exhibit 18 at tab  
7 4; Exhibit --

8 THE COURT: Hang on. Just let me catch up with you.

9 Okay, go ahead.

10 MR. GARBER: Exhibit 12 at tab 5.

11 THE COURT: Um-hum.

12 MR. GARBER: Exhibit 1 at tab 6; Exhibit 37 at tab 7;  
13 Exhibit 38 at tab 8; Exhibit 16 at tab 9; Exhibit 39 at tab 10.

14 THE COURT: Okay.

15 MR. GARBER: Exhibit 34 at tab 11; Exhibit 43 at tab  
16 12; Exhibit 40 at tab 13; Exhibit 41 at tab 14; Exhibit 2 at  
17 tab 15.

18 THE COURT: Tell me what this is, because you didn't  
19 use this. Tell me what it is.

20 MR. GARBER: Pardon me?

21 THE COURT: Tell me what it is. You didn't use this  
22 during any of the examinations.

23 MR. GARBER: Yes, Your Honor. These are the medical  
24 records on Exhibit -- tab -- Exhibit 2 at tab 15. That's the  
25 medical records of Dr. Lichi.

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1 THE COURT: Okay.

2 MR. GARBER: Which is the psychiatric that she saw.

3 THE COURT: Yes, I know who he is.

4 MR. GARBER: And then going to --

5 THE COURT: It's got a little doctor's handwriting.

6 MR. LEWIS: That's a lot like my dad's.

7 MR. GARBER: Going now to volume 2 of the trial  
8 notebook.

9 THE COURT: Okay.

10 MR. GARBER: Exhibit 3 at tab 16, the medical records  
11 of Naples Community Hospital. And Your Honor, actually,  
12 Exhibit 16 is quite long, and I have culled out, under tab 3,  
13 the records that I think most pertinent to my case. So the  
14 Court wanted us to indicate if we could --

15 THE COURT: Let me just -- say that again, because tab  
16 3, there are some dividers in between. When you say you've  
17 "culled out", this is -- tab 3 -- everything that you have as  
18 Exhibit 3 is a subset of medical records, is that what you're  
19 telling me?

20 MR. GARBER: Yes, Your Honor, it's all a subset.

21 THE COURT: Okay. All right. Next.

22 MR. GARBER: Exhibit 13 at tab 17; Exhibit 24 at tab  
23 18.

24 MS. HIENSCH: I'm sorry; you said 24?

25 MR. GARBER: Exhibit 24 at tab 18.

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1 THE COURT: Okay.

2 MR. GARBER: Exhibit 5 at tab 19.

3 THE COURT: Um-hum.

4 MR. GARBER: Exhibit 32 at tab 20; Exhibit 26 at tab  
5 21; Exhibit 21 at tab 22; Exhibit 28 at tab 23; Exhibit 8 at  
6 tab 24; Exhibit 9 at tab 25; Exhibit 36 at tab 26; Exhibit --

7 THE COURT: Wait, tell me what 36 is, because you  
8 didn't use that.

9 MR. GARBER: That is the client contract that sets up  
10 the relationship of the duties between GMACM and RFC.

11 THE COURT: Okay. Next?

12 MR. GARBER: Exhibit 4 at tab 27.

13 MR. LEWIS: Your Honor, I object to the introduction  
14 of the deposition of Barry Mack. Counsel said he was not going  
15 to use it, except for rebuttal, if at all.

16 THE COURT: This is Cheryl Mack -- deposition of  
17 Cheryl Mack.

18 MR. LEWIS: Well, Barry -- this tab says Barry and  
19 Cheryl Mack.

20 THE COURT: Tab 27 is --

21 MR. GARBER: I have Cheryl.

22 THE COURT: Oh -- no, that's the deposition of Cheryl  
23 Mack -- excerpts of the deposition of Cheryl Mack.

24 MS. HIENSCH: On the back of that I think there's  
25 Barry.

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1 MR. LEWIS: Just as long as it's clear that Barry  
2 Mack's deposition -- I think it's there, actually.

3 THE COURT: Just tell me what's behind tab -- I only  
4 see portions -- hold on. Exhibit 4 says "Depositions of Barry  
5 Macks and Cheryl Mack".

6 MR. LEWIS: Well, in the book --

7 THE COURT: Um-hum.

8 MR. LEWIS: -- the only -- why don't you look at his  
9 book?

10 THE COURT: Well, are we naming exhibits or the stuff  
11 in the book? What's marked as Exhibit 4 -- it has an exhibit  
12 tag on it -- are excerpts of the deposition of Cheryl Mack.

13 MR. LEWIS: That's fine, Your Honor.

14 THE COURT: Am I correct in that, Mr. Garber?

15 MR. GARBER: Yes, Your Honor.

16 THE COURT: Just excerpts of the deposition of Cheryl  
17 Mack?

18 MR. GARBER: That's in the book, but I believe that  
19 Exhibit 27 has the entire deposition.

20 THE COURT: Well, this is not Exhibit 27; we're  
21 looking --

22 MR. GARBER: Or Exhibit 4, rather, is the entire  
23 deposition of Cheryl Mack. It's a videotape deposition and a  
24 transcript.

25 THE COURT: So you're telling me you don't have the

1 whole exhibit in your binder?

2 MR. GARBER: No, Your Honor, I only have highlights  
3 that I wanted to bring to the Court's attention.

4 THE COURT: And what is it that you're offering?

5 MR. GARBER: I'm offering the entire transcript.

6 THE COURT: I'm not -- I don't -- I think I've made  
7 clear to you before; I don't permit people to dump entire  
8 deposition transcripts into the record. You didn't follow my  
9 directions previously. I made clear that when you do  
10 deposition designations, that's what you've got to do by page  
11 and line number. I don't permit entire depositions to be  
12 dumped into evidence, which is what you appear to be attempting  
13 to do. You give me binders, you give me some smaller notebooks  
14 that have excerpts of the Cheryl Mack deposition. I don't  
15 think I could have been any clearer in saying -- and I think  
16 Mr. Lewis complained about this earlier, that you were supposed  
17 to do, by page and line number, designations from any  
18 depositions that you wish to offer in evidence. And then Mr.  
19 Lewis was going to have to object to the specific designations  
20 that you were offering. I never saw anything that you provided  
21 with designations, okay?

22 MR. LEWIS: Your Honor, what happened was I did  
23 complain, but what you ended up deciding was that I should  
24 write you a letter objecting to passages that I would object  
25 to, which I did.

1 THE COURT: Yeah.

2 MR. LEWIS: You didn't, at that time, require Mr.  
3 Garber to do any further designations.

4 THE COURT: What is your position, Mr. Lewis, with  
5 respect to the deposition of Cheryl Mack?

6 MR. LEWIS: Well, my position with respect to the  
7 deposition of Cheryl Mack is if he's specified pages and  
8 excerpts in his notebooks, that's good; I'm fine with that.  
9 But if he's asking you to admit the entire deposition so that  
10 he can refer to whatever passages he might in the end, I don't  
11 think that's appropriate.

12 THE COURT: How did you decide what to put in this  
13 little binder you gave me, volume 2 of your trial notebook --  
14 of your hearing notebook?

15 MR. GARBER: They seemed to be the most salient  
16 passages from her deposition. Her deposition was taken at her  
17 house and was videotaped, and it took about an hour and a half  
18 or two hours; she was on oxygen and so forth.

19 THE COURT: No, it didn't, because I did not watch the  
20 entire video; I watched a portion of the video. I think there  
21 was, like, two hours in the morning and there was, sort of, two  
22 hours in the afternoon. And I must say, most of what I saw had  
23 absolutely no bearing on a RESPA claim.

24 MR. LEWIS: That was, incidentally, Your Honor, the  
25 nature of most of my objections, that it wasn't relevant to

1 this case.

2 THE COURT: See, that's why I require designations and  
3 counter- designations, okay, because it allows me not to have  
4 to go through three or four hours of -- particularly, you sent  
5 me the DVDs; that was nice. I wanted to see a little bit of  
6 it; I did watch some of it. And some of it I, kind of, readily  
7 let it play on my desktop computer here, and didn't pay much  
8 attention to it because it had no bearing, whatsoever, on a  
9 RESPA claim. It was taken in the case against Deutsche Bank,  
10 okay?

11 What is it that you believe you need, beyond what's in  
12 the excerpts you provided?

13 MR. GARBER: Let me review it briefly; it's been some  
14 time since I've looked at it.

15 She complains that she was not getting answers from  
16 Deutsche Bank, that she was complaining about this, and  
17 eventually she was led to write the letter, which she did not  
18 get a response to.

19 THE COURT: Hold on. Let me understand. That's in  
20 the excerpts in the book?

21 MR. GARBER: Yes, Your Honor, that's in the excerpt --

22 THE COURT: Yeah.

23 MR. GARBER: -- in the book.

24 THE COURT: I'm prepared to admit that, okay, in  
25 evidence. I don't hear Mr. Lewis complaining about --

1 objecting to that, right?

2 MR. LEWIS: No, Your Honor, except to the extent that  
3 my relevance objections or other objections --

4 THE COURT: I --

5 MR. LEWIS: -- would apply to those passages.

6 THE COURT: Okay. Look --

7 MR. LEWIS: These passages were not supplied to me in  
8 advance. I had to do my objections in the dark, and some of  
9 them may relate to what's in the booklet; I don't know yet.

10 THE COURT: That, I would -- look, my reaction is I'm  
11 prepared to admit portions of the deposition as background,  
12 okay? I don't know that it needs to be tightly linked to  
13 preci -- from what I watched, I mean, I got a sense about what  
14 utter frustration Mrs. Mack felt expressed in the depo -- in  
15 the portions of what I watched, which I can fully understand.  
16 That doesn't necessarily mean there's a RESPA claim against  
17 GMAC, but I've said this before and I'll say it now: I don't  
18 know that its' actionable, but it was pretty horrible the way  
19 GMAC dealt with the Macks' account. I mean, say what you want;  
20 it just -- it was. Well, I'm going to admit in evidence, for  
21 such weight as it's entitled to, the excerpts of the deposition  
22 of Cheryl Mack that are marked as Exhibit 4, and contained in  
23 creditor Barry F. Mack's hearing notebook volume 2. I am not  
24 going to consider anything else because I was not provided with  
25 page and line number designations, as I insist upon. The

1 relevance of some of what's even in here is questionable but  
2 relevant background. Let me put it that way.

3 What's next?

4 MR. GARBER: Your Honor, in addition to that, I had  
5 some other exhibits that I've submitted --

6 THE COURT: Can I ask --

7 MR. GARBER: -- that are not in the notebook.

8 THE COURT: Yeah, I mean, 28 is not in the notebook.  
9 29 is not in the notebook. 30 and 31, I have no idea what they  
10 are.

11 MR. GARBER: I'm sorry. You referred to 28 and 29  
12 aren't in the notebook?

13 THE COURT: This -- that volume, your trial -- your  
14 hearing notebook --

15 MR. GARBER: Yes.

16 THE COURT: -- it's blank behind the tabs for 28, 29,  
17 30, 31, but nothing there.

18 MR. GARBER: Yeah, I don't think there's anything --  
19 supposed to be anything there; I don't know why that's there.

20 THE COURT: Oh, okay. So what else do you have?

21 MR. GARBER: Your Honor, in addition, I would ask to  
22 move into evidence Plaintiff's Exhibit number 7; it's a copy of  
23 the complaint that was filed by Deutsche Bank. I have as  
24 Plaintiff's Exhibit number 7--

25 THE COURT: That's the same thing, Mr. Lewis'

1 exhibit --

2 MR. GARBER: Yes, Your Honor. He has the same --

3 THE COURT: Which was it? DX-A is the foreclosure  
4 complaint. That's what you're talking about?

5 MR. GARBER: Yes, Your Honor. And Your Honor, we did  
6 not designate it in our -- that number in our hearing notebook,  
7 but it was Exhibit 3, which was found at tab -- I'm sorry,  
8 found at tab 12. We didn't have a designation but that's what  
9 we decided to --

10 THE COURT: I'm sorry, which exhibit?

11 MS. HIENSCH: Exhibit --

12 MR. GARBER: That was Exhibit 43, found at tab 12.

13 THE COURT: Right. Right. You listed that, I think.

14 MR. GARBER: Yeah.

15 THE COURT: You did; you already listed that.

16 MR. LEWIS: Your Honor, that's not on the exhibit  
17 list. Which exhibit is that, please?

18 THE COURT: It --

19 MR. GARBER: It was Exhibit 43 at tab 12.

20 THE COURT: It was in the binder. It's the letter --  
21 it's the October 26th, 2009 letter.

22 MR. LEWIS: It's the letter, Your Honor.

23 THE COURT: It's the letter.

24 MR. LEWIS: Okay.

25 THE COURT: It's the letter, yes. You listed that

1 when you went through, Mr. Garber.

2 MR. GARBER: Okay. And I think that's all the  
3 exhibits. Well, can I go -- just because I see the numbers  
4 don't match up. I have thirty-two -- no, it matches up. I'm  
5 sorry. I didn't add them up right.

6 THE COURT: All right. Let me go back over one time,  
7 and then -- Exhibit 17, tab 1; Exhibit 29, tab 2; Exhibit 14,  
8 tab 3; Exhibit 18, tab 4; Exhibit 12, tab 5; Exhibit 1, tab 6;  
9 Exhibit 37, tab 7; Exhibit 38, tab 8; Exhibit 16, tab 9;  
10 Exhibit 39, tab 10; Exhibit 34, tab 11; Exhibit 43, the October  
11 26th letter, tab 12; Exhibit 40, tab 13; Exhibit 41, tab 14;  
12 Exhibit 2, tab 15; that's the Dr. Lichi notes; Exhibit 3, tab  
13 16; Exhibit 13, tab 17; Exhibit 24, tab 18; Exhibit 5, tab 19;  
14 Exhibit 32, tab 20; Exhibit 26, tab 21; Exhibit 21, tab 22;  
15 Exhibit 28, tab 23; Exhibit 8, tab 24; Exhibit 9, tab 25,  
16 Exhibit 36, tab 26; Exhibit 4, tab 27; Exhibit 7 is the same as  
17 DX-A; it's the Deutsche Bank foreclosure complaint. Okay. And  
18 with respect to Exhibit 4, that's tab 27, it's the excerpts,  
19 portions of the deposition of Cheryl Mack.

20 Okay. Do I have that right, Mr. Garber?

21 MR. GARBER: Yes, Your Honor.

22 THE COURT: Any objection, Mr. Lewis?

23 MR. LEWIS: I'd like to ask, if I may, Your Honor,  
24 whether Mr. Garber intends to introduce Dr. Lichi's notes  
25 wholesale. We specified specific entries in our exhibits, sort

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1 of like the issue with Mrs. Mack's transcript. And the same is  
2 true with medical records, specified specific excerpts.

3 THE COURT: All right. With the exception of Exhibit  
4 2, behind tab 15, Dr. Lichi's notes, do you have any objection  
5 to anything else?

6 MR. LEWIS: None, Your Honor.

7 THE COURT: All right. So all of -- we'll get to Dr.  
8 Lichi's notes, Exhibit 2, behind tab 15. And I take it,  
9 including Exhibit 7, the Deutsche Bank complaint -- foreclosure  
10 complaint, you have no objection to those --

11 MR. LEWIS: No.

12 THE COURT: -- documents? Okay. All right. So all  
13 of those documents are admitted into evidence.

14 (Plaintiff's Exhibits 17, 29, 14, 18, 12, 1, 37, 38, 16, 39,  
15 34, 43, 40, 41, 3, 13, 24, 5, 32, 26, 21, 28, 8, 9, 36, 4, and  
16 7 were hereby received into evidence, as of this date.)

17 THE COURT: With respect to Exhibit 4, behind tab 27,  
18 the Court is only admitting the excerpts of the Cheryl Mack  
19 deposition that are contained here in the notebook.

20 Okay. We have to come back and deal with Dr. Lichi's  
21 notes, Exhibit 2. So we're going to hold on that a minute -- a  
22 few minutes, at least.

23 Okay. Mr. Lewis, tell me what exhibits you're  
24 offering.

25 MR. LEWIS: Yes, Your Honor. I'm just going to go

1 straight down the list --

2 THE COURT: Okay.

3 MR. LEWIS: -- from A to Z, whatever we've got.

4 THE COURT: You're not really offering A through Z,  
5 are you?

6 MR. LEWIS: No. I'm just telling you how I'm going to  
7 sequence it.

8 THE COURT: Okay. All right.

9 MR. LEWIS: So the ones we would like admitted -- are  
10 you at the index, Your Honor?

11 THE COURT: Yes, I am.

12 MR. LEWIS: Okay. It would be B --

13 THE COURT: So for the foreclosure complaint is -- you  
14 want that in? Both of you want --

15 MR. LEWIS: That's the answer and counterclaims. He's  
16 got the foreclosure complaint in.

17 THE COURT: Well, you have it marked as Exhibit A.

18 MR. LEWIS: No, the foreclosure complaint is Exhibit  
19 A. Exhibit B is the answer and counterclaims --

20 THE COURT: I know. Are you offering the foreclosure?  
21 I've heard it's already admitted.

22 MR. LEWIS: No.

23 THE COURT: You're not?

24 MR. LEWIS: Yeah. No.

25 THE COURT: Okay. All right. It's in evidence

1 already.

2 MR. LEWIS: Yeah.

3 THE COURT: Go ahead.

4 MR. LEWIS: Some of these may be duplicative --

5 THE COURT: Yes, okay.

6 MR. LEWIS: -- but I have --

7 THE COURT: Okay, go ahead.

8 MR. LEWIS: We would like to admit Exhibit C.

9 THE COURT: Did you say B, the answer --

10 MR. LEWIS: C.

11 THE COURT: Yeah, you're not offering B either?

12 MR. LEWIS: We are offering B.

13 THE COURT: You --

14 MR. LEWIS: We are offering B.

15 THE COURT: Okay. All right. All right, B, C --

16 MR. LEWIS: C, D, E, F. G is the purged loan notes,

17 which have already been admitted. It's up to the Court whether

18 it wants to make a separate note of this.

19 THE COURT: Okay. Go ahead.

20 MR. LEWIS: H is the same; it's the October --

21 THE COURT: Right.

22 MR. LEWIS: -- it's the letter.

23 THE COURT: Okay.

24 MR. LEWIS: K, L -- let me ask you this question, Your

25 Honor. Are pleadings automatically deemed part of the record

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1 for purposes of the trial?

2 THE COURT: No.

3 MR. LEWIS: Okay. So we would like to admit L and M.  
4 We'd like to admit some of the other pleadings that are not on  
5 this list. They're --

6 THE COURT: Well, you can ask me to take judicial  
7 notice of pleadings, but the problem with not offering them  
8 into evidence is they may well have lots of hearsay. You can  
9 ask me to take judicial notice of pleadings and I'll decide  
10 what weight they're entitled.

11 MR. LEWIS: Absolutely, yeah.

12 THE COURT: But --

13 MR. LEWIS: It's mostly for oral arguments that are in  
14 them, not for the evidence in them.

15 THE COURT: Well, let's go through your exhibits  
16 first --

17 MR. LEWIS: Okay.

18 THE COURT: -- before you --

19 MR. LEWIS: I'm up to M.

20 THE COURT: Yep.

21 MR. LEWIS: And then N.

22 THE COURT: What's the relevance of a transcript  
23 from --

24 MR. LEWIS: That's the July 12th hearing on the motion  
25 conference -- January 12th.

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1 THE COURT: All right. Go ahead, N, go ahead.

2 MR. LEWIS: O, and then from Q, Q(b) and Q(c) specific  
3 excerpts from Dr. Lichi's notes. From R, R(a) and R(b), T,  
4 another specific excerpts from medical records, U, more  
5 specific excerpts from medical records. W, which is certain  
6 excerpts from Mr. Mack's deposition.

7 THE COURT: Okay.

8 MR. LEWIS: And X, which is the fax dismissal that we  
9 introduced yesterday.

10 THE COURT: Okay. Mr. Garber, do you have any  
11 objection to those exhibits that Mr. Lewis has identified?

12 MR. GARBER: Your Honor, I would object to N, which is  
13 the transcript of the 1/12/15 status conference. That was --  
14 there was no evidence presented; there was argument of counsel  
15 presented on how the matters would proceed.

16 MR. LEWIS: That's not accurate, Your Honor.

17 THE COURT: You're trying to -- you want to rely on --  
18 tell me why -- what's your offer as to N?

19 MR. LEWIS: Sure. That status conference was also a  
20 motion conference, because we'd asked for a motion conference  
21 for a summary judgment motion. One of the issues that I  
22 raised, in arguing and describing the summary judgment motion,  
23 on the issue of the address to which the letter was sent, was  
24 that it was sent to the wrong address, the address for general  
25 inquiries, instead of the address for QWRs. Mr. Garber got up

1 and said, well, the Macks thought they were sending a general  
2 inquiry; he said that.

3 THE COURT: Okay. You can ask me to take judicial  
4 notice of the transcript of the hearing, and to the extent that  
5 Mr. Garber made any statements that estop him from arguing  
6 otherwise, you can argue about that. But it's not evidence,  
7 per se. You can ask me -- I'll take judicial notice of the  
8 transcript, and you can make your arguments about what effect  
9 it had. Let me deal with this right up front, okay?

10 And Mr. Garber, you started to say something  
11 yesterday. I think you said you would raise it today; this is  
12 with respect to the pre-trial order, the stipulation in the  
13 pre-trial order -- let me find the paragraph number. Paragraph  
14 26 of the stipulation contained in the joint pre-trial order,  
15 which is, "Shortly thereafter, on October 26th, 2009, the  
16 claimant sent the letter using an address other than the one  
17 specified for QWRs on the monthly mortgage statements GMACM  
18 sent to the claimants, as was on all monthly mortgage  
19 statements GMACM sent to borrowers."

20 So I think you indicated yesterday you wanted to  
21 address that. Mr. Lewis, in his Exhibit O, was the monthly  
22 mortgage statement for, I believe, November 2, 2009. And I  
23 believe you asked -- he asked Mr. Mack some questions, and then  
24 on redirect, I think you asked a question, was it -- did he  
25 know it was in the prior mortgage statements, and he said no.

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1                   So what's your position with respect to the  
2 stipulation in paragraph 26 in the pre-trial order?

3                   MR. GARBER: Your Honor, I think it's only fair that I  
4 should have admitted everything I believe to be true. In this  
5 particular case, I don't know what monthly mortgage statements  
6 they may or may not have gotten. I haven't seen of them. It  
7 is quite possible that is true, and I was hoping we might have  
8 evidence today that would show that previous statements also  
9 gave that address. But since I don't think we've introduced  
10 any of those, and since there is no evidence that there were  
11 other monthly mortgage statements, then I don't believe that I  
12 should be entering into a stipulation for something that I  
13 don't know.

14                  THE COURT: Maybe you shouldn't, but you did. This  
15 was filed on the docket on February 20th, 2015.

16                  So look, here's why this whole issue is, from the  
17 Court's standpoint, somewhat murky. Bear with me a second.  
18 Reading from my opinion of July 24th, 2014 -- it's the  
19 memorandum opinion and order sustaining, in part, and  
20 overruling, in part, objection to proof of claim 386. This is  
21 not -- it is out of Westlaw, but I'm not referring -- I'm  
22 referring to the copy that's ECF docket number 7297.

23                  On page 11, the paragraph reads as follows. It's  
24 paragraph 2, "The QWR claim". "Next, Mack argues that the  
25 alleged RESPA liability here is based on GMACM's failure to

1 respond to Mrs. Mack's October 26, 2009 letter (the "QWR  
2 Claim")." I'm leaving out the citations within the opinion.  
3 "The trust agrees that the letter qualified as a QWR" with a  
4 citation to (May 15, 2014 Tr. at 59:10-14 (ECF Doc. # 6998).  
5 "GMACM's failure to respond to the letter would be a violation  
6 of RESPA. Although the Macks alleged a RESPA violation in the  
7 foreclosure action, that allegation did not involve a purported  
8 failure to respond to a QWR and instead centered on a different  
9 RESPA provision." That's from my opinion.

10 So I went back -- and I didn't bring it out with me,  
11 but I went back and looked at the transcript. You may have it  
12 with you; I don't know. But I asked Mr. Lewis some questions,  
13 and I asked -- the gist of which -- this is not a quote -- was  
14 whether you agreed that the October 26th, 2009 letter qualified  
15 as a QWR, and you said yes. So that's from the May 15th, 2014  
16 transcript, and that's in my opinion.

17 In the pre-trial order, Mr. Garber stipulates that --  
18 in paragraph 26 -- I read it a few minutes ago; I won't read it  
19 again; it says what it says. And then in setting out the  
20 parties' contentions, Mr. Lewis certainly made clear that the  
21 defendant contends that it's not a QWR because it was sent to  
22 the wrong address. So the issue was clearly framed in the pre-  
23 trial order. There isn't -- from the Court's standpoint, as I  
24 thought this through, this isn't a situation where Mr. Garber  
25 can't argue that the issue -- you know, you didn't know this

1 was going to be an issue, okay?

2 So I've got Mr. Lewis' seeming admission in May, and  
3 I've got your stipulation in the pre-trial order, okay? So  
4 when I thought it through, Mr. Garber, if I were in Mr. Lewis'  
5 position, I'd say, well, I have the stipulation; I don't have  
6 to offer -- I've put in Exhibit O, the November 2 -- clearly  
7 it's, like, a week -- I don't know when it's mailed; it says  
8 it's a statement for November 2; the letter's October 26th.  
9 Then I start to say, well, do I have an earlier statement  
10 before that has the QWR -- you know, that has the RESPA  
11 address? I don't. The only exhibit is R; you pointed that  
12 out. But on the other hand, I say, Mr. Lewis, why should he --  
13 he didn't have to come forward with an earlier statement  
14 because he could rely on the stipulation.

15 So I've sort of been pondering this, okay? We all  
16 know the Second Circuit's Roth case. Mr. Lewis relies on it a  
17 lot. You, in your brief, seek to distinguish Roth. It is what  
18 it is. And I haven't made up my own mind about it.

19 So tell me, Mr. Lewis, if you can, have you looked for  
20 prior statements? I know you didn't offer any, but are there  
21 prior loan -- you know, monthly mortgage statements?

22 MR. LEWIS: Well, let me just first say I didn't  
23 prepare that part of the case because I didn't think I had to.  
24 I did ask some questions, and my understanding is, when I dug  
25 this one out, at Mr. Mack's deposition, I then inquired whether

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1 they could generate others, and the answer was no, that the  
2 system cannot recreate those, and that the images of those  
3 would have been destroyed because the loan was closed and paid  
4 off. And so there was really no way, other than to sort of  
5 survey the world to see whether there were other ones we might  
6 come up with from somebody.

7 THE COURT: Look, I mean, I --

8 MR. LEWIS: And if I could just add, Your Honor, just  
9 very quickly?

10 THE COURT: Go ahead, yeah.

11 MR. LEWIS: When you asked me -- for what this is  
12 worth; I understand the Court will make evident its wishes  
13 here. When you asked me if I thought this was a QWR, I thought  
14 you were asking about the content; that is, was this the kind  
15 of thing that would qualify as a QWR because of what it asked  
16 about. And I --

17 THE COURT: Well, the transcript was pretty -- I  
18 think, when I went back and looked it, but what -- go ahead; I  
19 interrupted you.

20 MR. LEWIS: That's what I recall.

21 THE COURT: Okay. So look, Roth doesn't get decided  
22 until June 24th, 2014. And the hearing at which you made the  
23 statement was May 15th, 2014. I don't know whether you saw  
24 Roth or not. I hadn't seen it at the time, but that's beside  
25 the -- I didn't bring that. I had looked at the transcript

1 online. It was a pretty clear answer to what I thought was a  
2 fairly clear question. But when I say this is murky, look --

3 MR. LEWIS: You evidently were asking something  
4 different than I understood you were asking.

5 THE COURT: No, but when I say this is murky, I mean,  
6 on the one hand, Mr. Garber, you can say, well, Mr. Lewis  
7 admitted it qualifies as a QWR. And he can say, but he  
8 stipulated, in paragraph 26 of the joint pre-trial order, that  
9 the letter was sent using an address other than the one  
10 specified for QWRs on the monthly mortgage statement.

11 So you want to -- effectively, you want to be relieved  
12 from your stipulation, and that's what's murky about this whole  
13 thing. On the one hand, you could argue, well, Mr. Lewis  
14 conceded this issue on May 15th. And he can say, but I raised  
15 the issue -- and that wasn't -- it wasn't an evidentiary  
16 hearing. It wasn't -- you know. He subsequently asked for  
17 leave to file a summary judgment motion. I said no; I wanted  
18 to see what the evidence was.

19 I may be dragging this out more than -- let me ask you  
20 this, Mr. Lewis. Are you telling me that the trust can't  
21 generate -- I can't believe they had ten different forms they  
22 used, so maybe the Macks' loan got paid off when it did, but  
23 are there loan statements for other loans, or are there monthly  
24 statements for loans -- monthly statements predating October  
25 26th, 2009?

1 MR. LEWIS: I don't know, Your Honor. I know there  
2 was one in Footrel (ph.), but I think that was later.

3 THE COURT: Okay.

4 MR. LEWIS: I think. It did have the same information  
5 on it, although I think there were other issues --

6 THE COURT: See, I don't think you ought to be -- I  
7 don't -- Mr. Garber, I can't relieve you -- in good -- in my  
8 view of this, I can't relieve you of the stipulation without  
9 giving -- and I'm not saying I'm going to relieve you of the  
10 stipulation, but I'd certainly -- it would be -- I think it  
11 would be error for me to relieve you from the consequences of  
12 the paragraph 26 stipulation without, at a minimum, providing  
13 Mr. Lewis an opportunity to show -- if it doesn't exist for the  
14 Mack loan, it may well exist for other loans.

15 MR. LEWIS: Your Honor, I'm sorry --

16 THE COURT: I'd be really surprised, Mr. Garber,  
17 whether it was changed on November 2nd from what it was on  
18 October 2nd, but let me just -- go ahead.

19 MR. LEWIS: If I could add, Your Honor, that  
20 stipulation was intensely negotiated. It went through a number  
21 of drafts by each side, and we each got some things we wanted  
22 and didn't get some things we wanted that we thought should  
23 have been agreed to. But we reached an agreement that we  
24 thought simplified the case for us and for the Court, and that  
25 was the agreement, and it was there right along.

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1 THE COURT: I wouldn't have -- what's giving me some  
2 pause, Mr. Lewis -- maybe I ought to look on the docket, okay,  
3 and I'll find -- let me open up the transcript. I will find  
4 the transcript.

5 MR. LEWIS: I do have the transcript; I just don't  
6 have it with me.

7 THE COURT: Okay. No, I'll find it; that's okay. Let  
8 me look.

9 (Pause)

10 THE COURT: Oh I have it. My computer's slow and --  
11 why don't you just go print out the page, or the page before  
12 and the page after, or something like that, okay, because this  
13 computer doesn't want to log on.

14 MR. LEWIS: Your Honor, could I ask that an extra copy  
15 be printed so I can follow along?

16 THE COURT: Print up copies of the page --

17 MR. LEWIS: Thank you.

18 THE COURT: -- three copies.

19 Well, let's try to use this time while my law clerk  
20 is -- my computer's still not booting up. Let's just talk  
21 about Dr. Lichi's notes, most of which I can't read.

22 MR. LEWIS: Your Honor, there's -- I think there's  
23 transcription of those notes.

24 THE COURT: Is it?

25 MR. LEWIS: Yeah, what happened, Your Honor, was we

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1 subpoenaed Dr. Lichi -- it took us awhile -- in Florida. He  
2 was not anxious to appear. He's a doctor, he's busy; I  
3 understood that. So we reached an agreement, which Mr. Garber  
4 blessed in advance, that he would not have to appear. Mr.  
5 Garber agreed that his records would be business records. And  
6 I also required of Dr. Lichi, as a condition of that, that Dr.  
7 Lichi transcribe his records --

8 THE COURT: Okay.

9 MR. LEWIS: -- so that we could read them. And --

10 THE COURT: Oh, that's behind it. I see, okay.

11 MR. LEWIS: Yes.

12 THE COURT: All right.

13 MR. LEWIS: Mr. Garber also went along with that and  
14 was willing to treat those as business records too. I actually  
15 managed to read most of them and put them in proper order, but  
16 it took some days.

17 THE COURT: I bet it did. So why are you objecting to  
18 admitting all of those notes?

19 MR. LEWIS: I'm not objecting to admitting all of the  
20 notes, per se; I just want to know which ones he wants to refer  
21 to and why. It's just like Mrs. Macks' deposition.

22 THE COURT: They're not -- but these, unlike Cheryl  
23 Macks' deposition -- I'm looking at the transcription of the  
24 notes; this is not that voluminous. I mean --

25 MR. LEWIS: No, it's not.

1                   THE COURT: I'm putting this issue to rest. Exhibit 2  
2 is admitted. I'm admitting Exhibit 2 into evidence.  
3 (Dr. Lichi's medical notes were hereby received into evidence  
4 as Plaintiff's Exhibit 2, as of this date.)

5                   MR. LEWIS: Very well, Your Honor.

6                   THE COURT: Okay. Look, you all can argue what you  
7 want. I mean, Mrs. Mack was a troubled person. She was  
8 troubled for a long time. I appreciated that, when we had our  
9 little bench conference off the record, that you didn't find it  
10 necessary to cross-examine Mr. Mack about things about their  
11 relationship and stuff like that.

12                  MR. LEWIS: Well, we stipulated facts on a number of  
13 these issues, and that's one of the reasons I'm not using much  
14 of Dr. Lichi's notes.

15                  THE COURT: Okay. Let me let -- my law clerk  
16 correctly raised -- what is that you're offering, Mr. Garber,  
17 in Exhibit 3, the medical records?

18                  MR. GARBER: Your Honor, I think what I had referred  
19 to in my tab 16 Exhibit 3, is the excerpts about her  
20 hospitalization, the references to her suicide attempt, the  
21 medical condition that she found herself in as a result of that  
22 hospitalization, and the references to the foreclosure. Let me  
23 just look and -- yeah, I've only taken out those records from  
24 the Naples Hospital that show that period of time, in my tab.  
25 And I think those are the major portions of the medical records

1 that are relevant.

2 THE COURT: So what I have in your trial notebook are  
3 excerpts from more voluminous medical records?

4 MR. GARBER: Yes, Your Honor.

5 THE COURT: And are you objecting to those, Mr. Lewis?

6 MR. LEWIS: No, Your Honor.

7 THE COURT: All right.

8 MR. LEWIS: I was objecting to the admission of all  
9 the medical records.

10 THE COURT: Okay. But you don't have an objection to  
11 what's in --

12 MR. LEWIS: No.

13 THE COURT: -- the hearing binder as --

14 MR. LEWIS: No.

15 THE COURT: -- Exhibit 3? Okay. So that's not an  
16 issue.

17 All right. So Mr. Pierce, my law clerk, has given me  
18 the portions of that transcript from May 15th, 2014, and at  
19 page 59, the Court says, "Okay, so let me ask you first, Mr.  
20 Lewis, would you agree that Exhibit C, which is at ECF 6834-3,  
21 which was filed on April 29th, 2014 here, that that letter  
22 would satisfy the requirements of a qualified written request?"

23 Mr. Lewis: "Yes, I do, Your Honor."

24 MR. LEWIS: Your Honor, I can only tell you what I  
25 remember, and what I remember was I was thinking you were

1 asking about the context, because most things don't come in  
2 that say at the top "Qualified written request". And a lot of  
3 informal letters could be qualified written requests because  
4 they have information requests in them that would make them,  
5 conceptually, QWRs. That's what I understood the Court to be  
6 asking. Perhaps I should have asked the Court to qualify -- to  
7 clarify, but that --

8 THE COURT: Have you seen the -- never mind; I won't  
9 ask that question. Bear with me a second.

10 MR. LEWIS: Another point here, Your Honor, is that  
11 when you asked me that question, the whole QWR had just come  
12 up, the Court will recall, and I was at the beginning of my  
13 process of trying to analyze what our defenses might be.

14 THE COURT: Look, first let me say that I'm going to  
15 ask Mr. Lewis to order an expedited copy of the transcript from  
16 the trial so that this doesn't drag out forever. I'm going to  
17 permit both sides to submit simultaneous -- we're not going to  
18 have back-and-forth briefs, one from each side, post-trial  
19 memoranda from each side.

20 So in the timing -- I realize we don't know what date  
21 you're going to get a transcript. There's no question in my  
22 mind that you can be working on post-trial briefs before you  
23 get the transcripts. I'm sure you both have notes and you know  
24 what the exhibits -- we only had three witnesses. It's  
25 important to me that I get this matter decided before my law

1 clerks leave in early September. Okay. The three of us have a  
2 lot of time invested in this case, and their assistance is  
3 important to me. So I only -- that's, in part, my  
4 reluctance -- there are only three witnesses too. I mean, just  
5 it's not that complicated.

6 So find out, within the next day or so, how long it's  
7 going to take you to get a transcript, and then you and Mr.  
8 Garber try and agree on a date for submitting your post-trial  
9 memoranda.

10 MR. LEWIS: Does the Court have some sort of outside  
11 objective date? I mean, I'll live with -- we can live with  
12 whatever --

13 THE COURT: No, because I -- look, we've done a lot of  
14 case on this case already; I want to make that clear. And I've  
15 taken notes and my law clerks have taken notes. I have three  
16 interns for the summer; they're taking notes as well. And so  
17 I'm not waiting until I get the post-trial to start. I'm not  
18 deciding the matter. But find out when you're going to get a  
19 transcript; that's number one. So it's going to cost more, but  
20 get an expedited transcript, okay?

21 Mr. Lewis, I'm not resolving today this issue of  
22 relieving Mr. Garber of the paragraph 26 and the stipulation;  
23 it says what it says. And I know, Mr. Lewis, you're saying,  
24 well, you didn't understand my question, on May 15th, the way I  
25 think I ask it, but I'm not resolving that either. I want to

1 know -- you ought to be able to find out in the next week, by  
2 the end of next -- I'm away next week anyway, okay? By the end  
3 of next week, you ought to be able to find out whether you can  
4 get a copy of a GMAC monthly mortgage statement, the GMAC  
5 Mortgage account statement for another borrower. If it doesn't  
6 exist for the Macks, has to have been a form. And you can  
7 redact it to take out the names and stuff. What's really  
8 important is the second page; that's where the -- the addresses  
9 are here.

10 Not impossible, Mr. Garber, but I'd be really  
11 surprised if the address for QW -- that the format or the  
12 address changed in a month, and that's what we're really  
13 talking about.

14 And in my view, I'm not sure I'm relieving you; the  
15 stipulation is pretty clear to me, and effectively, I think  
16 you're asking me to relieve you of the consequences of that  
17 stipulation. And but for the somewhat ambiguous transcript  
18 from May 15th, I would probably just say no, if that's what's  
19 before me, and that's the end of the subject. But I would like  
20 to see if there's a statement for a period, close in time,  
21 before October 26th.

22 MR. LEWIS: If I can find one, Your Honor, how would  
23 you like me to submit it?

24 THE COURT: With a declaration that authenticates it.

25 MR. LEWIS: By filing?

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1 THE COURT: Yes.

2 MR. LEWIS: Okay.

3 THE COURT: And obviously, Mr. Garber will get it too.

4 MR. LEWIS: Yes, also to Mr. Garber.

5 THE COURT: And we'll see.

6 MR. LEWIS: Okay.

7 THE COURT: Let me raise -- let's assume that I  
8 conclude the October 26th letter is a QWR. You've put in some  
9 evidence, Mr. Garber, and I haven't read the doctor's notes,  
10 and I need to read that, about -- look, as I understand your  
11 claim, at least what remains of the case, it's the RESPA  
12 claim -- you're seeking emotional distress, noneconomic --  
13 damages for noneconomic loss related to infliction of emotional  
14 distress on Cheryl Mack.

15 MR. GARBER: Yes, Your Honor.

16 THE COURT: I listened carefully, and I didn't hear  
17 Mr. Mack testify about anything that would come close to  
18 establishing what's required to establish a claim, on his  
19 behalf, for intentional infliction of emotional distress. So  
20 the issue is Mrs. Mack. Do you agree with that?

21 MR. GARBER: Yes, Your Honor.

22 THE COURT: Okay. And I've done some research, again,  
23 on the assumption that the October 26th letter qualifies as a  
24 QWR, on the issue of damages. How do I determine damages? I  
25 mean, intentional infliction of emotional distress is not the

1 garden-variety case before a bankruptcy judge. Okay. And I've  
2 been trying to focus on how am I supposed to determine --  
3 assuming that I find GMAC culpable on that claim, how do I  
4 determine the amount of damages? And I want to focus -- I  
5 mean, before I get to the damages point -- and it's also a  
6 question for what period of time. All right?

7 And so when you do your post-trial memoranda, let me  
8 tell you some of the other things that are running through my  
9 mind, okay?

10 Mr. Lewis, in your pre-trial brief, and in arguments  
11 to the Court, you focused on the fact that GMAC didn't have to  
12 respond to the QWR, assuming it's a QWR, until December 26th --

13 MR. LEWIS: Yes, Your Honor.

14 THE COURT: -- 2009. That's not quite right. The  
15 statute, as it existed then, or the rules, as existed then,  
16 required that GMAC acknowledge receipt of the QWR within twenty  
17 days, and they didn't do that. And 2605 -- I think 2605(e)(2),  
18 in substance, provides that the servicer is liable for actual  
19 damages to the borrower as a result of the "failure". Well,  
20 the failure includes, in my -- I think the -- I'm not deciding  
21 it, but it looks to me that the failure includes failure to  
22 acknowledge within twenty days, not just the sixty days. Okay?  
23 That's not addressed in your brief. I'm not sure that you  
24 addressed it either, Mr. Garber, but that's certainly  
25 something --

1 MR. LEWIS: Never a claim that has been made in this  
2 proceeding.

3 THE COURT: Well, he claimed that GMAC violated --  
4 committed a RESPA violation, and he's argued that damages can  
5 go back to -- can wait until the date of response. But I'm  
6 telling you that, based on my reading of the law, the failure  
7 to acknowledge is a violation; I mean, in twenty days, failure  
8 to acknowledge a QWR is a violation, and the loan servicer can  
9 be liable for that. So this isn't a question -- at least the  
10 way of my tentative thinking is, this isn't just a question of  
11 whether they had until December 26th. They had until -- I  
12 don't know, you know, assuming it's a QWR, they had until about  
13 November 20th, something like that. Okay.

14 And then I listened to the evidence carefully, and  
15 they enter into a contract to sell the property in early  
16 December. Would they have gone forward if there had been some  
17 acknowledgement from GMAC? I don't know.

18 And then I must say, one of the things -- whether it's  
19 actionable, what's recoverable, Stern finally gets around to  
20 dismissing the foreclosure action on what, December 8th?

21 MR. LEWIS: It's filed on December 8th, served on  
22 December 2nd.

23 THE COURT: Okay. No, it's entered on December 8th,  
24 dismissed on December --

25 MR. LEWIS: Correct.

1                   THE COURT: Okay. I thought, wow, did Stern finally  
2 get the message that this was supposed to be dismissed? All I  
3 can say is the payoff statement -- and it's in the servicing  
4 notes; Mr. Garber went through it with Mr. Cunningham today. I  
5 mean, they made Mr. Mack pay all of Stern's fees. They made  
6 him pay the filing fee for foreclosure. It's clear --  
7 obviously, I'm not blaming you, but GMAC -- they keep these  
8 rolling notes, with everybody putting in their little piece,  
9 and if somebody had actually looked at them, they would have  
10 seen this foreclosure never should have happened. The Macks  
11 were current; the foreclosure was filed anyway. They tell Mrs.  
12 Mack, oh, it was a mistake; it's going to be dismissed. It  
13 doesn't get dismissed until much later. It gets dismissed, but  
14 they still exact a pound of flesh. And it may be the economic  
15 loss he recovered already, okay? I'm not -- that's not the  
16 point. But if emotional distress damages are recoverable, it  
17 didn't end in December. My point is that it doesn't  
18 necessarily end on December 8th because GMAC insisted on -- in  
19 its payoff statement, they just wouldn't release the lien, you  
20 know? They don't get paid under the payoff statement, they  
21 don't release the lien.

22                   MR. LEWIS: Well, Your Honor, first of all, we have no  
23 testimony, of any kind, about such emotional distress after  
24 that date --

25                   THE COURT: Well, I think we do.

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1 MR. LEWIS: And then --

2 THE COURT: I think we do. I think we most certainly  
3 do, in my view.

4 MR. LEWIS: And the second thing is, just it's worth  
5 keeping in mind that the suicide attempt, there's some  
6 disagreement over when that happened.

7 THE COURT: Well, I think November --

8 MR. LEWIS: Well, we --

9 THE COURT: -- 10th or 11th or something like that.

10 MR. LEWIS: -- we think earlier, but --

11 THE COURT: Okay.

12 MR. LEWIS: And we have some evidence that we're  
13 introducing for that.

14 THE COURT: I think -- look, a fair statement that the  
15 suicide attempt clearly occurred before an acknowledgement --

16 MR. LEWIS: Exactly.

17 THE COURT: -- of the QWR was due. Okay.

18 So let's assume that Mr. Garber can't successfully tag  
19 GMAC for her suicide attempt. Let's assume that for now.

20 That may -- it certainly enters in my mind about  
21 trying to figure out, if I were to award damages, what those  
22 damages are to be. So the restatement of tort (second) -- so  
23 there is no separate cause of action for intentional  
24 interference in connection with infliction of emotional  
25 distress here. The issue is whether, under a RESPA claim,

1 noneconomic damages are recoverable. So when you -- when I  
2 look at the law on intentional infliction of emotional  
3 distress, the courts never state -- set a very high bar for any  
4 recovery, because it's easy for people to claim they're  
5 emotionally distressed because of something bad that happened  
6 to them.

7 So restatement of tort (second), Section 46, is the  
8 section that -- and the commentary deals with intentional  
9 infliction of emotional distress. It makes clear it can  
10 also -- and I looked at cases from a number of states,  
11 primarily New York, but I looked elsewhere. New York follows  
12 the restatement, Section 46. Recklessness is enough, okay? It  
13 doesn't -- you don't have to have an evil intent; recklessness  
14 is enough. And you want to address whether GMAC was reckless  
15 in how they handled this whole mess, okay?

16 The standard is a high bar: extreme and outrageous  
17 conduct is pretty much what the standard or the conduct has to  
18 be. That's not a measure of damages. But in order to find  
19 liability, it has to be extreme and outrageous conduct; I'm  
20 sure it may need somewhat longer analysis.

21 So let's assume that Mr. Garber has established that,  
22 just assume, for purposes of discussion. The issue then  
23 becomes how does one figure out damages, and there are a number  
24 of -- I'm not finding the restatement in here. I sent myself  
25 an e-mail attaching them. There it is.

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1 MR. LEWIS: While you're looking at that, Your Honor,  
2 I think it's important, at least as I understand what's at  
3 issue here, that it's the conduct with respect to the QWR, if  
4 there was one, not the conduct with respect to the foreclosure.

5 THE COURT: Yes, I agree there.

6 MR. LEWIS: Okay.

7 THE COURT: I agree completely. Okay.

8 MR. LEWIS: I was just a little concerned when you  
9 said "this whole mess".

10 THE COURT: I agree; it has to relate to the QWR --  
11 related to acknowledge or respond to the QWR.

12 So the point about whether it's acknowledge or  
13 respond, neither of which they did, where they done or not, and  
14 I realize it's disputed; whether it's a QWR, I realize it's  
15 disputed. But there has to be, my term, some proximate cause  
16 between what happened.

17 So here's from a New York case, "Nonpecuniary damages,  
18 the key component in the tort of intentional infliction of  
19 emotional distress are, by their nature, not susceptible to  
20 mathematical computation." I'm going to leave the cites out.  
21 "The plaintiff's subjective testimony of pain may be sufficient  
22 to establish an injury for which he or she is entitled to some  
23 compensation, but the proof must satisfactorily establish that  
24 the injury is more than minimal. Verdicts awarding  
25 compensatory damages will be upheld unless they can be said

1 that the reward 'deviates materially from what would be  
2 reasonable compensation'". That's from -- the name of the cite  
3 of the case --

4 MR. LEWIS: Your Honor, if it's from the restatement,  
5 we can --

6 THE COURT: -- but it's the case --

7 MR. LEWIS: -- we can find it.

8 THE COURT: It's Marie, and it's -- okay, 559 N.Y.S.2d  
9 336. It's a 1990 Appellate Division Second Department  
10 decision. And I read you a short blurb from a statement quoted  
11 from the case. But the restatement sections you ought to look  
12 at are 46 -- these are all from the restatement (second), of  
13 course -- 46, 905, 912, 910, and 917.

14 And I was also surprised by how little law I found on  
15 figuring out what damages to award. Most of the case law is  
16 about how high the bar has to be for extreme and outrageous  
17 conduct. And most of them are on motions to dismiss, sometimes  
18 they're motions to set aside a verdict, but very few when a  
19 jury returns a verdict for damages.

20 I looked at some jury instructions; they didn't  
21 provide much guidance either. So I agree with you, Mr. Lewis,  
22 that the issue is not whether Mrs. Mack was distressed --  
23 severely distressed from the wrongful foreclosure. Yes, the  
24 issue was -- but the fact that she may have had a history of  
25 mental health problems can't absolve --

1 MR. LEWIS: I understand that part of the law, Your  
2 Honor.

3 THE COURT: And --

4 MR. LEWIS: You take your victim as you find her.

5 THE COURT: Yeah, you take your victim as you find  
6 her.

7 MR. LEWIS: I understand that.

8 THE COURT: And boy, it sure isn't hard to say that  
9 anybody, suddenly faced with the risk of losing their home,  
10 when they believe they're current on their payments -- they're  
11 stretching, but they're current. And I know you're -- I heard  
12 the evidence; I clearly have it in mind that they actually put  
13 their house on the market considerably before this whole thing  
14 happened. I'm certainly mindful of that. But I guess did they  
15 sell the -- did they enter into the contract in early December  
16 with a gun to their head because they thought they were facing  
17 imminent foreclosure? What kind of economic damages for -- I  
18 guess you put in an appraisal. And Mr. Garber, you showed that  
19 the value of the house was 300,000 dollars roughly more than  
20 what they entered into the contract sale for, and you've got to  
21 be worried to do that, and that was damages.

22 So I'm rambling here, but I mean, I've spent a lot of  
23 time thinking about this, not deciding it. So it's a serious  
24 issue whether it's QWR. You could say it's hard medicine, but  
25 I'm bound by it.

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1                   So I will be away next week, but by a week from  
2 tomorrow I do want some written communication as to whether  
3 you've been able to get it, and if you get it, file it with a  
4 declaration authenticating it.

5                   MR. LEWIS: Would you like for us to communicate to  
6 chambers when the reporter thinks the expedited transcript --

7                   THE COURT: I do.

8                   MR. LEWIS: -- will be available?

9                   THE COURT: I would.

10                  Let me see whether there's any other guidance I can  
11 give you. All right. I think I've resolved all of the  
12 evidence issue. You know what the record is before you, right?

13                  Maybe I didn't say this. The defendant's exhibits  
14 that Mr. Lewis has offered are admitted except for that one  
15 transcript as to which the Court pled judicial notice. That's  
16 the one where you wanted to hold Mr. Garber to the statement he  
17 made; I think he wants to hold you to the statement you made.

18 (Defendant's Exhibits B, C, D, E, F, G, H, K, L, M, N, O, Q(b),  
19 Q(c), R(a), R(b), T, U, W, X were hereby received into  
20 evidence, as of this date.)

21                  THE COURT: Any questions?

22                  MS. HIENSCH: I have a question, Your Honor.

23                  THE COURT: Yes, go ahead. So will you be making your  
24 decision as to whether or not to hold Mr. Garber to his  
25 stipulated fact before or after --

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1 THE COURT: No, I'm not -- I'm going to make -- I'm  
2 only making one decision --

3 MS. HIENSCH: Okay.

4 THE COURT: -- one decision. But I just --

5 MS. HIENSCH: So we should be briefing both of those  
6 issues?

7 THE COURT: Yeah, and just so it's clear, Mr. Garber,  
8 in my view, has asked to be relieved from the stipulation  
9 contained in paragraph 6 of the joint pre-trial order. And  
10 what I've indicated, ordinarily, I wouldn't even consider, at  
11 this stage of a case, doing that, but in light of what I've  
12 already discussed about the May 15th transcript, I'm  
13 considering it. But I also believe it would be inappropriate  
14 for me to relieve Mr. Garber of the consequences of paragraph  
15 26 stipulation without giving Mr. Lewis the chance to try and  
16 come forward with evidence to show that the QWR address, they  
17 were on notice of what it was before the October 26th letter  
18 was sent. I'm not making a decision now; I'm asking Mr. Lewis  
19 to see what he can find.

20 MR. LEWIS: I will do that, Your Honor.

21 THE COURT: Okay? I appreciate the efforts of both  
22 sides. The case was well prepared. It's a difficult case.  
23 You really ought to try and settle this case. I know I've said  
24 that countless times before, but I'll say it one more time;  
25 that's all.

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1 Okay, thanks very much.

2 MR. LEWIS: Thank you, Your Honor.

3 THE COURT: You can -- don't wait for me to pick up my  
4 stuff.

5 MR. LEWIS: The affidavit?

6 UNIDENTIFIED SPEAKER: Judge, you wanted a copy of the  
7 affidavit?

8 THE COURT: Yes, I do, that you cross-examined --

9 UNIDENTIFIED SPEAKER: I need to give you --

10 THE COURT: -- Mr. Cunningham's -- the affidavit you  
11 filed in that other case. I had you mark it for  
12 identification.

13 UNIDENTIFIED SPEAKER: We don't have a copy of it.

14 THE COURT: And we don't have a copy, and we'll get  
15 you a copy.

16 (Whereupon these proceedings were concluded at 4:53 PM)

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2 I N D E X

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2 C E R T I F I C A T I O N

3

4 I, Penina Wolicki, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

6

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9

*Penina Wolicki*

10

11

12 PENINA WOLICKI

13 AAERT Certified Electronic Transcriber CET\*\*D-569

14

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19 Date: June 15, 2015

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